COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

VOLUME I
Requête ; mémoire de Nauru

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU

(NAURU *v.* AUSTRALIA)

VOLUME I
Application ; Memorial of Nauru

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L'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, inscrite au rôle général de la Cour sous le numéro 80 le 19 mai 1989, a fait l'objet d'un arrêt rendu le 26 juin 1992 (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 240). Elle en a été rayée par ordonnance de la Cour du 13 septembre 1993, à la suite du désistement par accord des Parties (*Certaines terres à phosphates à Nauru (Nauru c. Australie), C.I.J. Recueil 1993*, p. 322).

Les pièces de procédure relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance de Nauru ; mémoire de Nauru.

Volume II. Exceptions préliminaires de l'Australie ; exposé écrit de Nauru sur les exceptions préliminaires.

Volume III. Contre-mémoire de l'Australie ; procédure orale sur les exceptions préliminaires ; réponses écrites aux questions ; choix de correspondance ; document présenté à la Cour.

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La Haye, 2003.

The case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, entered on the Court's General List on 19 May 1989 under Number 80, was the subject of a Judgment delivered on 26 June 1992 (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). The case was removed from the List by an Order of 13 September 1993, following discontinuance by agreement of the Parties (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1993*, p. 322).

The pleadings in the case are being published in the following order :

Volume I. Application instituting proceedings of Nauru ; Memorial of Nauru.
Volume II. Preliminary objections of Australia ; written statement of Nauru on the preliminary objections.
Volume III. Counter-Memorial of Australia ; oral arguments on the preliminary objections ; written replies to questions ; selection of correspondence ; document submitted to the Court.

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, certain documents reproduced in the present volume have been photographed from their original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the pleadings reproduced and occasionally, within parentheses, the pagination of the original document.

In references by the Registry, bold Roman numerals are used to refer to volumes of this edition ; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded by a reference to one of the pleadings relate to the original pagination of that pleading and accordingly refer to the bracketed pagination of the document in question.

In the case of the oral arguments, the original pagination is preceded by the number of the verbatim records as issued in a provisional duplicated form and carrying the reference CR 91/– and it is also to the corresponding pagination between square brackets on the inner margin of the pages that one should refer for all cross-references.

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The Hague, 2003.

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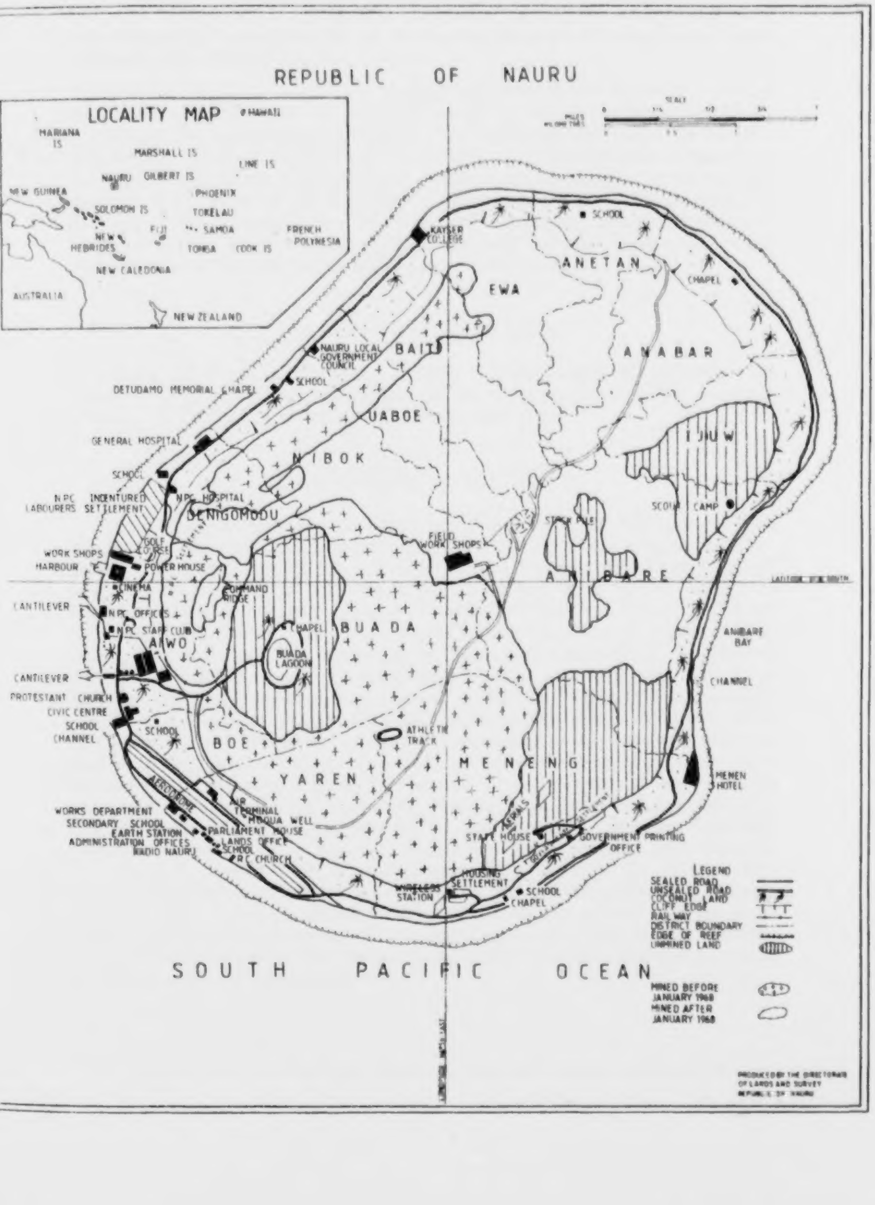
REQUÊTE INTRODUCTIVE D'INSTANCE PRÉSENTÉE PAR LE GOUVERNEMENT DE NAURU

APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF NAURU

Phosphate Land Mined Before January 1968

Terres à phosphates exploitées avant janvier 1968


REPUBLIC OF NAURU
LOCALITY MAP
HAWAII
MARIANA IS
MARSHALL IS
NAURU
GILBERT IS
LINE IS
NEW GUINEA
SOLOMON IS
PHOENIX
TOKELAU
FIJI
SAMOA
FRENCH POLYNESIA
NEW HEBRIDES
TONGA
COOK IS
NEW CALEDONIA
AUSTRALIA
NEW ZEALAND
SCALE
MILES
KILOMETRES
KAYSER COLLEGE
SCHOOL
ANETAN
EWA
CHAPEL
ANABAR
BAITI
NAURU LOCAL GOVERNMENT COUNCIL
DETUDAMO MEMORIAL CHAPEL
UABOE
IJUW
GENERAL HOSPITAL
NIBOK
NPC INDENTURED LABOURERS SETTLEMENT
NPC HOSPITAL
DENIGOMODU
SCOUT CAMP
STOCKPILE
FIELD WORK SHOPS
WORK SHOPS
HARBOUR
GOLF COURSE
POWER HOUSE
ANIBARE
LATITUDE 0°32' SOUTH
CINEMA
COMMAND RIDGE
CANTILEVER
NPC OFFICES
NPC STAFF CLUB
CHAPEL
BUADA
AIWO
BUADA LAGOON
ANIBARE BAY
CANTILEVER
PROTESTANT CHURCH
CIVIC CENTRE
SCHOOL
CHANNEL
CHANNEL
ATHLETIC TRACK
BOE
YAREN
MENENG
MENEN HOTEL
AERODROME
AIR TERMINAL
MOQUA WELL
WORKS DEPARTMENT
SECONDARY SCHOOL
EARTH STATION
PARLIAMENT HOUSE
ADMINISTRATION OFFICES
LANDS OFFICE
RADIO NAURU
SCHOOL
R.C. CHURCH
STATE HOUSE
GOVERNMENT PRINTING OFFICE
WIRELESS STATION
HOUSING SETTLEMENT
SCHOOL
CHAPEL
LEGEND
SEALED ROAD
UNSEALED ROAD
COCONUT LAND
CLIFF EDGE
RAIL WAY
DISTRICT BOUNDARY
EDGE OF REEF
UNMINED LAND
MINED BEFORE JANUARY 1968
MINED AFTER JANUARY 1968
SOUTH PACIFIC OCEAN
LONGITUDE 166°55' EAST
PRODUCED BY THE DIRECTORATE OF LANDS AND SURVEY REPUBLIC OF NAURU

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Republic of Nauru and being the duly appointed Counsel for the Republic of Nauru:

I have the honour to refer to the Declarations made by the Republic of Nauru and by the Commonwealth of Australia accepting the jurisdiction of the Court as provided for in Article 36, paragraph 2, of its Statute and, under the jurisdiction thereby conferred on the Court, to submit, in accordance with Article 40 of the Statute and Article 40 of the Rules of Court, an Application instituting proceedings in the name of the Republic of Nauru against the Commonwealth of Australia in the following case, involving the dispute between the Republic of Nauru and the Commonwealth of Australia over the rehabilitation of certain phosphate lands worked out before Nauruan independence.

I. Jurisdiction of the Court

1. Both the Republic of Nauru and the Commonwealth of Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, without any relevant reservation.

II. Background to the Dispute

2. The Nauruans have occupied their island in the Central Pacific as an independent people since time immemorial. In 1888, Nauru was annexed by Germany and became part of the Imperial German Protectorate of the Marshall Islands. This annexation occurred after Nauru had been placed within the German sphere of influence under the Anglo-German Convention of 6 April 1886[1]. In 1900 extensive phosphate deposits were discovered on Nauru and on nearby Ocean Island. The concession to mine phosphate within the Imperial German Protectorate of the Marshall Islands was held by the Jaluit Gesellschaft; that concession was renewed in 1905 for 94 years. The concession could not be transferred except with the consent of the Imperial Chancellor. On 12 December 1905 the Imperial Chancellor consented to the transfer of the concession to the Pacific Phosphate Company, an Anglo-German consortium incorporated in the United Kingdom and formed for the purpose of exploiting the phosphate deposits on both Nauru and Ocean Island. The concession was actually transferred by an agreement of 22 January 1906, and the Company exploited the phosphate on Nauru in a relatively small way from 1907 onwards.

3. On 6 November 1914, after the outbreak of the First World War, Australian forces occupied Nauru. At the end of the war, the Australian Government expressed a desire to annex Nauru, in order to gain control over the phosphate deposits in the interests of Australian agriculture. But at the Versailles Conference it was agreed that Nauru, along with other German colonies, would be placed under the Mandate system.

---

[1] G. F. de Martens, *Nouveau recueil général de traités* (2nd series), Vol. XI, p. 507.

4. The Mandate for Nauru was conferred upon "His Britannic Majesty" by the Principal Allied and Associated Powers under Article 119 of the Treaty of Versailles of 28 June 1919[2], and pursuant to Article 22 of the League of Nations Covenant. Thereafter, pursuant to Article 22, paragraph 8, of the Covenant, the League of Nations Council on 17 December 1920 "confirmed" the Mandate for Nauru, and defined the conditions on which it would be exercised[3]. Under the Mandate the Mandatory undertook to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate" (Art. 2).

5. Shortly after it had been decided to allocate the Mandate for Nauru to the "British Empire", on 2 July 1919, the Australian Government reached an agreement with the United Kingdom and New Zealand with the expressed intention of making "provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said island"[4]. Under Article 1 the administration of the island was vested in "an Administrator", with the first Administrator to be appointed for five years by the Australian Government. In fact, the Australian Government appointed all the Administrators of the island until independence. The Administrator was given by Article 1 "power to make Ordinances for the peace, order, and good government of the island, subject to the terms of this Agreement". The Administrator's powers were not limited by the provisions of the Mandate. Under Article 2 the expenses of the administration, so far as they were not met by other revenue, were to be paid for out of the proceeds from phosphate sales.

6. The 1919 Agreement also provided for a Board of Commissioners (the British Phosphate Commissioners (BPC)) consisting of three members, one appointed by each Government, in whom title to the phosphate deposits would be vested[5]. Article 9 provided for the phosphate deposits to be worked under "the direction, management and control of the Commissioners, subject to the terms of this Agreement". The three States were given priority of access to Nauruan phosphate, at a price which was to be set no higher than was necessary to cover the costs of mining and administration[6]. Phosphate not needed by them was to be sold at market price. Profits from the phosphate operations were to be "credited by the Commissioners to the three Governments . . . and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct, or, if so directed by the Government for which they are held, shall be paid over to that Government" (Art. 12). Article 13 of the Agreement provided:

---

[2] 112 *British and Foreign State Papers* 73.

[3] 113 *British and Foreign State Papers* 1111.

[4] The text of the Agreement is scheduled to the Nauru Island Agreement Act 1919 (Cth) and to the Nauru Island Agreement Act 1920 (UK).

[5] This vesting occurred by means of a subsequent Agreement of 25 June 1920 between the Crown (represented by the Australian and New Zealand High Commissioners in London and the British Secretary of State for the Colonies, acting on behalf of their respective Governments) and the British Phosphate Company. In return for taking over the Company's mining operations as a going concern the Governments agreed to pay to the Company 3,500,000 pounds.

[6] Article 14 allocated shares in the phosphate to each Government, with Australia and the United Kingdom receiving 42 per cent and New Zealand 16 per cent. In fact the United Kingdom used only a small fraction of this allocation, with the bulk of the phosphate (66 per cent) going to Australia: M. Williams and B. MacDonald, *The Phosphateers* (Melbourne University Press, Melbourne, 1985), p. 565.

> "There shall be no interference by any of the three Governments, with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement."

Thus the three Governments agreed that the provisions of the Agreement, which involved the working of Nauruan phosphates at cost price for the benefit of the agricultures of the three Governments, should take priority over all other purposes. The Agreement was required to be "ratified" by the three Parliaments (Art. 15). In fact it was "ratified" by the Australian Parliament by the Nauru Island Agreement Act 1919 (Cth), and approved by a resolution of the New Zealand Parliament[7], in each case without condition. But the ratification by the United Kingdom Parliament was expressed to be "subject to the provisions of Article 22 of the Covenant of the League of Nations": Nauru Island Agreement Act 1920 (UK), Section 1.

7. The Nauru Island Agreement of 1919 was amended by the Nauru Island Agreement 1923. The 1923 Agreement provided that:

> "2. The Administrator shall conform to such instructions as he shall from time to time receive from the contracting Government by which he has been appointed.
>
> 3. Copies of all ordinances, proclamations and regulations made by the Administrator shall be forwarded by him to the contracting Government by which he has been appointed, for confirmation or disallowance, and to the two other contracting Governments for their information; and the Administrator shall supply through the contracting Government by which he has been appointed such other information regarding the administration of the island as either of the other contracting Governments shall require."

Thus under the Agreement actual governing power with respect to the Territory was vested in the Government which had appointed the particular Administrator, with powers of legislation and disallowance vested exclusively in that Government.

8. With the exception of the Nauru Island Agreement Act 1920 (UK), by which the United Kingdom Parliament confirmed the Nauru Island Agreement 1919 "subject to the provisions of Article 22 of the Covenant of the League of Nations" (Sec. 1)[8], all legislation passed for Nauru from 1919 to 1968 (including the legislation under which Nauru became independent) was enacted by the Australian Parliament or by the Administrator appointed by and acting under the instructions of the Australian Government.

9. On 26 August 1942 Nauru was occupied by Japanese forces. Over two-thirds of the Nauruans were deported to the island of Truk in Micronesia, which was then under Japanese control, and through disease and poor working conditions the total number of Nauruans had fallen by almost a third in 1945. Nauru remained under Japanese occupation until 14 September 1945, when Australian forces retook the island.

10. Following the resumption of Australian administration, Nauru was brought under the trusteeship system pursuant to Article 77 (1) *(a)* of the Charter. Under the Trusteeship Agreement for the Territory of Nauru of 1 November

---

[7] *Public Acts of New Zealand (Reprint) 1908-1931*, Vol. 11, p. 657.

[8] See para. 6.

1947[9], the Governments of Australia, New Zealand and the United Kingdom were designated "as the joint Authority which will exercise the administration of the Territory" (Art. 2), but Article 4 provided for the actual administration to be vested in "the Government of Australia . . . except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom". It was never so agreed.

11. Under Article 3 of the Trusteeship Agreement the Administering Authority undertook

> "to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter".

Article 76 of the Charter provided that a basic objective of the trusteeship system was

> "*(b)* to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned".

Article 5 (2) *(a)* of the Trusteeship Agreement further provided that the Administering Authority would "Take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory". The Agreement was approved by General Assembly resolution 140 (11) of 1 November 1947, and came into force on that day.

12. The position of the Australian Government as the actual governing authority in Nauru was formalized by the Nauru Agreement of 26 November 1965 between the three Governments. That Agreement established a Legislative Council with power to make laws "for the peace, order and good government of the Territory": these laws would have effect when assented to by the Administrator or by the Governor-General of Australia, if it was reserved for the Governor-General's assent (Art. 1 (2), (3)). However, the Legislative Council's power was not to extend, among other things, to

> "(iii) the phosphate industry (including the operation, ownership and control of that industry);
> (iv) phosphate royalties; and
> (v) the ownership and control of phosphate-bearing land" (Art. 1 (2) *(a)*).

Article 3 provided:

> "Subject to the provisions of this Agreement, the administration of the Territory is, on and after the appointed day, to be vested in an Administrator appointed by the Government of the Commonwealth of Australia."

The Agreement superseded the Agreements of 1919 and 1923, which ceased to have effect (Art. 7). The Agreement was forthwith implemented by the Nauru Act 1965 (Cth).

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[9] 10 *United Nations Treaty Series* 3.

13. For some time before, the Nauruan people (acting through a Nauru Local Government Council established in 1951) had been seeking greater control over the phosphate industry and over their own lives. Discussions on control of the phosphate industry started in about 1964, and agreement was eventually reached, on 14 November 1967, about the arrangements for the future operations of the industry. The Nauru Island Phosphate Industry Agreement 1967 provided for the Council to take over the "capital assets of the phosphate industry at Nauru that are vested in the commissioners on behalf of the partner Governments" (Clause 7) at a valuation based on "original cost less depreciation at a rate consistent with the economic life of the asset" (Clause 8 (1)). The first instalment of the price so payable became due on 30 September 1967, and interest was charged at 6 per cent per annum on the unpaid balance (Clauses 9, 10). Under Clause 5 (1) phosphate from Nauru was required to be "supplied exclusively to the partner Governments" at the rate of two million tons per annum or as near as possible, at a price fixed in accordance with Clause 6. The Agreement contained provisions for the assumption on behalf of Nauru of liabilities with respect to the phosphate industry. The Agreement was subject to the law of the Australian Capital Territory (Clause 25)[10], and was deemed to have come into force on 1 July 1966. It was given effect to by the Nauru Phosphate Agreement Ordinance of 19 January 1968, an Ordinance of the Commonwealth of Australia made under the Nauru Act 1965 (Cth), ten days before Nauruan independence.

14. Nauru became independent as a Republic on 31 January 1968, pursuant to General Assembly resolution 2347 (XXII) of 19 December 1967 and to the Nauru Independence Act 1967 (Cth).

III. The Dispute between the Republic of Nauru and the Commonwealth of Australia

15. The dispute between the Republic of Nauru and the Commonwealth of Australia has its origins in the fact that from 1919 until 1 July 1967, when the Nauru Island Phosphate Industry Agreement 1967 came into force, the phosphate industry was carried on in such a way that the real benefit of phosphate mining went to the agricultural sectors in the three States, principally Australia. As a result the benefit derived by the Nauruans from phosphate was much lower than it should have been, both because the royalty rate was lower than it would have been in an arms-length negotiation, and because the price of phosphate, on which the royalty was calculated, was artificially kept well below world price[11]. A freely negotiated phosphate agreement, based on the recognition that the phosphate belonged to the Nauruan people, did not occur until 1967. When that Agreement came into force, approximately one-third of the phosphate lands on the island had been mined by BPC under Australian administration (see the map

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[10] This is the seat of the Australian federal Government. Under Section 122 of the Commonwealth of Australia Constitution, the Commonwealth Parliament has plenary legislative authority over the Australian Capital Territory.

[11] The accumulated revenue lost to Nauru as a result of the fact that BPC sold Nauru phosphate at less than the prevailing world price (taken as the price for Makatea phosphate from French Polynesia, which was of similar quality, and including an allowance for the loss of the opportunity to earn a return from those funds) has been estimated at approximately $A 335 million in 1987 prices. (For present purposes this calculation should be treated as provisional.)

reproduced as a frontispiece, above). As a result of this mining process, there remained on the mined-out lands nothing but a forest of limestone pinnacles, varying between 5 and 15 metres in height. The land was thus rendered completely useless for habitation, agriculture, or any other purpose unless and until rehabilitation was carried out.

16. Under the German administration of Nauru before 1914, provision was made for compensation to the Nauruan landowners for the reduced value of their lands as a result of mining [12]. However, shortly after Nauru came under Australian administration, an Ordinance was made setting out the terms for mining leases to be concluded with the Nauruan landowners, terms which avoided any reference to compensation or rehabilitation [13]. In the following year, all German laws applying to Nauru were repealed, including the Imperial Mining Ordinance for the African and South-Sea Protectorate of 1906 [14]. No equivalent Australian mining legislation was applied to Nauru. As a result, under the arrangements for mining on Nauru there was neither legislative nor contractual provision for the rehabilitation of those lands. Neither BPC nor the Australian administration accepted any obligation to provide for their rehabilitation.

17. Thus the Government of Australia, acting as the administration of Nauru, failed to make adequate and reasonable provision for the long-term needs of the Nauruan people, and in particular for restoring to a reasonable level the island of Nauru for habitation by the Nauruan people as a sovereign nation. Particulars of this failure are set out in the following paragraphs.

18. On many occasions BPC took decisions, which were accepted or ratified by the Australian administration, which directly affected the Nauruans and about which they were not consulted. In 1955-1956 and again in 1964, BPC unilaterally decided to increase greatly the extraction rate of phosphate (from about 1.1 million to 1.6 million tons in 1955-1956 and from 1.6 to 2.5 million tons in 1964) [15]. The effect of these decisions was to accelerate the potential exhaustion of the phosphate, and to ensure that it was mined out before BPC's concession expired in 2000.

19. BPC, supported by the Administering Authority, consistently took the view that there was no obligation to pay phosphate royalties to the Nauruan people. This was despite the fact that an obligation to pay some royalty had been acknowledged under the German administration before the First World War [16].

20. During the inter-war years some royalties were paid to the Nauruan people, increasing from a total of 3 pence per ton in 1922 to 8 pence per ton in 1939: this ranged from 0.3 per cent of the value of the phosphate exported (1922) to 5.1 per cent (1939). From 1948, when the export of phosphate from Nauru resumed, until 1965, when the first round of talks was held which eventually led to the Nauru Island Phosphate Industry Agreement 1967, the total royalty payments to the Nauruan people (including payments to the landowners

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[12] Imperial Mining Ordinance for the African and South-Sea Protectorate *(Schutzgebiete die Kaiserliche Bergverordnung)*, 27 February 1906, Articles 78, 83, as applied to Nauru pursuant to Article 92 and to an Addition *(Nachtrag)* to the Jaluit Gesellschaft's Concession on 27 February 1907.

[13] Lands Ordinance 1921 (Nauru), Sec. 2 (A).

[14] Laws Repeal and Adopting Ordinance 1922 (Nauru), Sec. 4 (1).

[15] N. Viviani, *Nauru Phosphate and Political Progress* (Australian National University Press, Canberra, 1971) (hereafter referred to as Viviani), pp. 128-129.

[16] Viviani, p. 132.

and to a Long Term Trust Fund) ranged from 2.6 per cent of the value of phosphate exported (1949) to 8.5 per cent (1961), with an average throughout this period of 5.94 per cent[17]. Moreover, in their mining operations in Nauru (unlike those on Ocean Island, a British colony) BPC accepted no obligation to replant trees, or otherwise to restore the land to a cultivable state[18].

21. The total costs of the administration of Nauru were payable by BPC, rather than being charged to the Administering Authority. Thus the administration of Nauru was run as a profit-making concern, supported entirely by the proceeds of the phosphate. In accordance with the 1919 Agreement (referred to in paragraph 6, above), phosphate was supplied to the three States as nearly as possible at cost price, allowing for BPC's costs and the limited payments made to the Nauruans. For example, in the period 1923-1940, BPC costs were never less than 91.4 per cent of the f.o.b. price of phosphate (a price which was itself well below world price), with administration and payments to Nauruans making up the remaining 8.6 per cent. For the period from 1948 to 1965, BPC costs as a percentage of f.o.b. prices averaged about 85 per cent. For the years from 1924 until 1953 for which data are available, the percentage of administration public funds spent solely for the Nauruan benefit never exceeded 40 per cent and in most years was less that 20 per cent[19].

22. The Nauruans were denied independent legal or economic advice with respect to the phosphate operation until 1964. For example, independent legal advice was refused in 1962[20], and independent advice was again refused in 1963[21]. Even when independent advice was permitted, in 1964, the particular adviser sought as first choice was refused[22].

23. The long-term implications of the phosphate mining occurring without any provision for rehabilitation were noted by United Nations bodies as early as 1949. In its *Report to the Trusteeship Council 6 August 1948-22 July 1949*, the Australian Government noted:

> "The phosphate deposits will be exhausted in an estimated period of seventy years, at the end of which time all but the coastal strip of Nauru will be worthless. The Australian Government is alive to the possibilities that the island may not then provide a satisfactory home for the indigenous population, and that it may be necessary to give the Natives an opportunity to transfer to some other island."[23]

In responding to the Australian report on that occasion the Trusteeship Council:

> "call[ed] upon the Administering Authority to ensure that, if any conflict arises between the needs of the inhabitants and the expansion requirements of the phosphate industry in such matters as materials, equipment and labour, the needs of the inhabitants must take precedence"[24].

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[17] The figures are taken from Viviani, pp. 187, 191.

[18] The express obligation to replant was the basis for the English High Court's decision in relation to Ocean Island in the case of *Tito* v. *Waddell (No. 2)*, [1977] 3 All ER 129.

[19] Viviani, p. 180.

[20] Viviani, p. 143.

[21] *Ibid.*, p. 135.

[22] *Ibid.* p. 136.

[23] United Nations, *Official Records of the General Assembly, Fourth Session, Supplement No. 4* (A/933), p. 74.

[24] *Id.*, p. 76.

24. General Assembly resolution 322 (IV) of 15 November 1949 resolved:

> "2. To reaffirm the principle that the interests of the indigenous inhabitants must be paramount in all economic plans or policies in Trust Territories . . ."

25. In each year from the early 1950s, the Trusteeship Council asked the Administering Authority to obtain detailed figures on BPC's Nauruan operations. On each occasion Australia's reply took a similar form:

> "The British Phosphate Commissioners is not a commercial undertaking working and selling the phosphate for profit. In these circumstances any question of comparison of price is irrelevant."

The Australian reply went on to assert that no separate financial accounts were kept for Nauru[25]. This repeated statement made by the Administering Authority was not true. Figures were and are available comparing on an annual basis the cost of BPC operations on Nauru and Ocean Island[26]. It can therefore be said that the Government of Australia persistently misled the Trusteeship Council and withheld from it relevant information about the phosphate operations on Nauru.

26. From 1949 onwards, the Trusteeship Council referred consistently to the long-term future of the Nauruans and to the possibilities of rehabilitation or resettlement. For example the *Report of the Trusteeship Council 18 December 1951-24 July 1952*, after referring to a further request from the Council for "studies of a technical nature" to be carried out in order to determine the possibility of making use of worked-out phosphate lands, recorded that "the Administering Authority stated that investigations to date indicated that it would not be practicable generally to make use of worked-out phosphate land"[27].

27. The Trusteeship Council frequently referred to the issue of royalties. For example, in the *Report of the Trusteeship Council 4 December 1952-21 July 1953*, the Council reported that the Administering Authority, in response to an earlier request to consider a further increase in royalties:

> "stated that the royalties were reviewed from time to time, but pointed out that they were not determined by the price of phosphate exported, but by the financial requirements of the present and future needs of the inhabitants"[28].

In response, the Council's Visiting Mission:

> "considered that the Local Government Council's request that the royalty rate should increase in proportion to the cost of living was basically legitimate. It was not, however, in a position to determine whether the cost of living had in fact risen since the royalty rate was last adjusted."[29]

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[25] Trusteeship Council, *Report on Nauru 1952-1953* (T/1076), p. 32, cited by Viviani, p. 126.

[26] See the Tables in Viviani, pp. 187-191. See also M. Williams and B. MacDonald, *The Phosphateers* (Melbourne University Press, Melbourne, 1985), pp. 564-565.

[27] United Nations, *Official Records of the General Assembly, Seventh Session, Supplement No. 4* (A/2150), p. 262.

[28] United Nations, *Official Records of the General Assembly, Eighth Session, Supplement No. 4* (A/2427), p. 119.

[29] *Ibid.*

Faced with this impasse, the Council yet again expressed the hope

> "that full details of the new financial arrangement between the Administering Authority and the British Phosphate Commissioners will be furnished in the next annual report" [30]

Again such details were not provided.

28. In 1955, the Trusteeship Council suggested "that the Administering Authority might give further consideration to the possibility of rehabilitating the worked-out phosphate lands" [31].

29. In 1956 the Trusteeship Council noted the Visiting Mission's comment that, although it was not in a position to judge what was a fair rate to be paid to or on the behalf of the Nauruans: "It was clear . . . that the royalty payment for the benefit of the Nauruans was low, at least in terms of their future needs." [32]

30. Similarly in 1962 the Trusteeship Council stated that:

> "It shares the view of the Visiting Mission that the strongest obligation rests with the Governments of the countries which have benefited from low-price, high-quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the cost of whatever settlement scheme is approved for the future home of the people of Nauru. In this connexion, it takes note with satisfaction of the declaration of the Administering Authority that ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance." [33]

This undertaking was reaffirmed in 1963 [34].

31. The Agreed Minutes at the end of the 1965 talks on Nauru recorded the following with respect to rehabilitation:

> "The Nauruan delegation stated that it considered that there was a responsibility on the partner Governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able on behalf of the partner Governments to make any commitment regarding responsibility for any rehabilitation proposals the objectives and cost of which were unknown and the effectiveness of which was uncertain." [35]

32. The Australian Government, confronted with the need to fulfil its obligations to resolve the difficulties for the Nauruan community caused by the non-rehabilitation of the phosphate lands, proposed their resettlement on Curtis Island in Queensland. But it refused to guarantee to the Nauruan community on

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[30] United Nations, *Official Records of the General Assembly, Eighth Session, Supplement No. 4* (A/2427), p. 119.

[31] *Report of the Trusteeship Council 17 July 1954-22 July 1955*, United Nations, *Official Records of the General Assembly, Tenth Session, Supplement No. 4* (A/2933), p. 220.

[32] *Report of the Trusteeship Council 23 July 1955-14 August 1956*, United Nations, *Official Records of the General Assembly, Eleventh Session, Supplement No. 4* (A/3170), p. 333.

[33] *Report of the Trusteeship Council 20 July 1961-20 July 1962*, United Nations, *Official Records of the General Assembly, Seventeenth Session, Supplement No. 4* (A/5204), p. 41.

[34] *Report of the Trusteeship Council 20 July 1962-26 June 1963*, United Nations, *Official Records of the General Assembly, Eighteenth Session, Supplement No. 4* (A/5504), p. 28.

[35] *Id.*, pp. 94-95.

Curtis Island its right to preserve and maintain its separate social identity; resettlement was thus envisaged as a step towards total assimilation of the Nauruan community into the Australian population. As a result the proposal for resettlement was unacceptable to the Nauruan people. The Australian Government made no other proposal to resolve the question of rehabilitation prior to independence.

33. General Assembly resolution 2111 (XX) of 21 December 1965, as well as calling upon the Administering Authority to establish a legislative council and to grant independence to Nauru not later than 31 January 1968:

> "*Further request[ed]* that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation".

34. Despite the earlier recommendations, it was not until 1965 that a study was made of the feasibility of a wholesale or partial rehabilitation or re-vegetation of the mined-out areas. That study recommended a form of partial rehabilitation with provision for adequate water catchment [36], but its recommendations were not acted on.

35. Further talks were held in 1967, leading to the Nauru Island Phosphate Industry Agreement of 14 November 1967 [37]. At this stage the Partner Governments sought to have incorporated in the Agreement a provision excluding any liability to rehabilitate the mined-out lands. In particular the Partner Governments stated that:

> "On the question of rehabilitation the Partner Governments maintain that it was not for them to decide what should be done for rehabilitation; this was the decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wish within reasonable limits, in the way of rehabilitation. As part of the total arrangements the joint delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation." [38]

The Nauruan position, as stated by Head Chief De Roburt, was that:

> "As the Island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed . . ." [39]

Similarly the Nauruan delegation stated:

> "We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or re-settlement." [40]

There was no resolution of this issue. The 1967 Agreement made no provision with respect to rehabilitation, one way or the other.

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[36] Territory of Nauru, *Report by Committee Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Lands* (1966), p. 44.

[37] For the provisions of the Agreement see para. 13, above.

[38] Nauru Talks 12 April-16 June 1967, Transcript, p. 56.

[39] *Id.*, p. 82.

[40] *Id.*, p. 112.

36. In 1966, the Trusteeship Council recalled General Assembly resolution 2111 (XX), and its provisions in relation to rehabilitation, and commented:

> "The Council recalls resolution 1803 (XVII) concerning permanent sovereignty over natural resources and invites the attention of the Administering Authority to its provisions." [41]

Similarly General Assembly resolution 2226 (XXI) of 20 December 1966 stated as follows:

> "*Recognizing* that the phosphate deposits on the island of Nauru belong to the Nauruan people . . .
>
> 3. *Recommends further* that the Administering Authority should transfer control over the operation of the phosphate industry to the Nauruan people and take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation."

37. The President of the Nauru Local Government Council, soon to become the Head Chief of Nauru, stated, in the course of United Nations discussions of the independence of Nauru in late 1967, that:

> "There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." [42]

38. The Special Committee of Twenty-Four in a resolution of 27 September 1967 requested the Administering Authority "to rehabilitate Nauru according to the express wish of the people so that they could continue to live there" [43].

39. General Assembly resolution 2347 (XXII) of 19 December 1967, adopted unanimously, recalled the earlier resolutions 2111 (XX) and 2226 (XXI), both of which contained strong recommendations with respect to rehabilitation, noted the agreement that Nauru should become independent on 31 January 1968 and resolved:

> "in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968 . . ."

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[41] *Report of the Trusteeship Council 1 July 1965-26 July 1966*, United Nations, *Official Records of the General Assembly, Twenty-first Session, Supplement No. 4* (A/6304), p. 43.

[42] Trusteeship Council, Thirteenth Special Session, 22 and 23 November 1967, T/SR.1323 and 1324, p. 3.

[43] *Ibid.*

40. Nauru has repeatedly sought from the Australian Government a recognition of its obligation to rehabilitate the lands in question. Despite these requests the Australian Government has consistently rejected the Nauruan claim for compensation or material assistance with respect to rehabilitation of the phosphate lands. For example, by Note of 27 July 1987, the Australian High Commission on Nauru stated:

> "the Australian Government regards the comprehensive Phosphate Agreement concluded prior to Independence as a just settlement that cleared the Partner Governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru"[44].

Thus the belated recognition in 1967 of Nauru's rights to the remaining phosphate has been unilaterally treated as excluding any rights to the rehabilitation of land mined before that time.

41. In view of the failure by the Australian Government to accept its responsibility in relation to the mined-out lands or to agree to negotiate on ways in which that responsibility might be met, as well as of the need to adopt an overall plan for the rehabilitation of all its phosphate lands, Nauru established an independent Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands. The Report of that Commission was delivered to His Excellency the President of Nauru on 29 November 1988, and was tabled in the Parliament on 20 December 1988. The Commission concluded, *inter alia*:

> "(1) that the failure to restore the worked-out land to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;
>
> (2) that there was no agreed or just settlement which exonerated the Partner Governments from the responsibility to rehabilitate the lands;
>
> (3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed, along lines specified in the Report"[45].

The Commission also recommended that a trial rehabilitation programme, covering several hectares of land mined after 1968, be undertaken. That recommendation was accepted and the trial rehabilitation programme has commenced.

42. On 20 December 1988, the Nauruan Government, in a Note to the Australian Government, reaffirmed its view that Australia (in its capacity as the actual Administering Authority of Nauru) had failed to make any proper provision for the long-term needs of the Nauruan people, and that this failure, which was a breach of the relevant agreements and of general international law, took the form, *inter alia*, of a failure to make any provision for restoring the worked-out phosphate lands to a reasonable level for habitation by the Nauruan people as a sovereign nation[46]. In response, the Australian High Commission to Nauru merely recalled its Note of 27 July 1987, and reserved its position with respect to

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[44] The text of the Australian Note of 27 July 1987 is set out in Appendix 1.

[45] The Commission of Inquiry estimated the total rehabilitation cost for the pre-1968 lands at $A 72,120,000: Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands, *Report* (1988), Chap. 35.

[46] The text of the Nauruan Note of 20 December 1988 is set out in Appendix 2.

the Republic of Nauru's claim[47]. Similar Notes were sent to the Governments of New Zealand and the United Kingdom, and produced a similar response[48].

IV. The Claims of Nauru

43. Nauru claims that Australia — by its acts and omissions as set out in Part III of this Application — has breached the express obligations accepted by it under Article 76 of the United Nations Charter and under Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.

44. Nauru further claims that Australia — by its acts and omissions as set out in Part III of this Application — has breached its obligations arising with respect to Nauru under general international law.

45. In particular Nauru claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967, and having regard to the terms and conditions on which Australia allowed those lands to be exploited, failed to comply with international standards recognized as applicable in the implementation of the principle of self-determination.

46. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967, and having regard to the terms and conditions on which Australia allowed those lands to be exploited, engaged in a denial of justice in the broad sense (denial of justice *lato sensu*) with respect to the Nauruan people.

47. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967 and having regard to the terms and conditions on which Australia allowed those lands to be exploited, abused its rights over the Territory of Nauru and with respect to the Nauruan people, and, by reason of its improper and arbitrary conduct as Administering Authority in Nauru, engaged in acts of mal-administration wrongful under international law.

48. Nauru further claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967, failed to comply with applicable international standards in respect of the preparation for and transfer of control by a predecessor in title or a predecessor responsible for the control and administration of territory.

49. Nauru further claims that there exists a duty of restitution in respect of acts of the Respondent State which involved a failure to take into account the rights and interests of the Nauruan people in relation to the habitability of Nauru, or of the Republic of Nauru as a successor in respect of the Territory of Nauru, and that this duty extends to the restoration of those parts of the island, mined under Australian administration before 1 July 1967, to a reasonable condition for habitation by the Nauruan people as a sovereign nation.

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[47] The text of the Australian Note of 3 March 1989 is set out in Appendix 3.

[48] British High Commission Note of 6 March 1989; New Zealand High Commission Note of 9 February 1989.

V. RELIEF REQUESTED

50. For these reasons, each of which is pleaded in the alternative, Nauru, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare that Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered. Nauru further requests that the nature and amount of such restitution or reparation should, in the absence of agreement between the Parties, be assessed and determined proceedings.

51. In respect of the bases of claim enumerated in paragraphs 43 to 49 (inclusive) above, Nauru reserves the right to ask the Court, at the appropriate stage of the proceedings, to reflect the particular elements of excess and the lack of ordinary consideration in the conduct of the Respondent State by an award of aggravated or moral damages (in the compensatory mode).

52. The Republic of Nauru has designated the undersigned, Mr. V. S. Mani, as its Agent for the purposes of these proceedings, without prejudice to its general right to appoint another Agent and/or Co-Agents. All communications relating to this case should be sent directly to the Republic of Nauru. The Agent for the Republic will, as soon as possible, advise you of the address of the embassy of a friendly foreign country to the Netherlands to provide an address for service in The Hague pursuant to Article 40 (1) of the Rules of Court.

Respectfully submitted,

(Signed) Ian BROWNLIE.

Duly authorized for this
purpose in accordance with Article 38,
paragraph 3, of the Rules of Court.

13 May 1989.

AUTHENTICATION

I, V. S. Mani, being the Chief Secretary and Acting Secretary for External Affairs of the Republic of Nauru, hereby certify, in accordance with Article 38 (3) of the Rules of the International Court of Justice, that the above signature is that of Professor Ian Brownlie, who has been duly authorized to sign this Application on behalf of the Republic.

Dated this thirteenth day of the month of May, nineteen hundred and eighty-nine.

(Signed) V. S. MANI,

Chief Secretary and Acting Secretary
for External Affairs,
Republic of Nauru.

Appendix 1

AUSTRALIAN NOTE OF 27 JULY 1987

(See paragraph 40)

Note No. 45/87

The Australian High Commission presents its compliments to the Department of External Affairs of the Republic of Nauru and has the honour to refer to the Department's Notes Nos. 205/86 of 3 December 1986, 18/87 of 20 January 1987, 69/87 of 20 February 1987 and 105/87 of 16 April 1987, regarding the Commission of Inquiry into the Rehabilitation of Worked-out Phosphate Lands in Nauru.

The High Commission has the honour to advise the Department that requests made by the Department for specific documents will be dealt with in accordance with the principles embodied in the Australian Freedom of Information Act and the Archives Act. These principles involve, amongst other matters, the resource and cost implications of meeting the request and the nature of particular documents encompassed by the request.

The High Commission wishes to point out that the Government of Australia will not be bound by the findings of the Commission of Inquiry.

The High Commission wishes to record that the Australian Government regards the comprehensive Phosphate Agreement concluded prior to Independence as a just settlement that cleared the Partner Governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru.

The Australian High Commission avails itself of this opportunity to renew to the Department of External Affairs of the Republic of Nauru the assurances of its highest consideration.

Nauru.
27 July 1987.

Certified correct:

(Signed) V. S. MANI,
Agent for the Republic of Nauru.

13 May 1989.

Appendix 2

NAURUAN NOTE OF 20 DECEMBER 1988
(See paragraph 42)

REPUBLIC OF NAURU

Note No. 167/1988

The Department of External Affairs of the Republic of Nauru presents its compliments to the Australian High Commission and has the honour to refer to the High Commission's Notes Nos. 14/84 of 19th March, 1984, 45/87 of 27th July, 1987 and 4/88 of 3rd February, 1988 relative to the rehabilitation of the phosphate lands worked out before Nauru's independence.

The Department of External Affairs has the further honour to record that the Report of the Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands in Nauru was delivered to His Excellency the President of Nauru on 29th November, 1988, and was tabled in Parliament on 20th December, 1988. A copy of that Report accompanies this Note.

The Department of External Affairs wishes to reaffirm the position which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence, that the administering authority under the mandate and trusteeship over Nauru was and remains responsible for the rehabilitation of the phosphate lands worked out in the period of its administration of Nauru, prior to 1st July, 1967 when the Nauru Island Phosphate Agreement 1967 entered into force.

Specifically, the Department of External Affairs wishes to reaffirm that Australia, in its capacity as one of three states involved in and party to the Mandate and Trusteeship agreement over Nauru, failed to make proper provision for the long-term needs of the Nauruan people, whose welfare was a sacred trust and overriding responsibility under the relevant agreements, and that this failure, which was a breach of those agreements and of general international law, took the form, *inter alia,* of a failure to make any provision for restoring the worked-out phosphate lands to a reasonable level for habitation by the Nauruan people as a sovereign nation. The Department notes that at no stage has the Government of Nauru, or any authorized representative of the Nauruan people, accepted or agreed that the Nauru Island Phosphate Agreement cleared the partner Governments or any of them of their responsibility for the rehabilitation of the lands.

Accordingly, the Department of External Affairs reaffirms that the Australian Government was and remains under an obligation to make reparation for this failure, whether in the form of monetary compensation or by making, in co-operation with the Government of Nauru, full provision for the rehabilitation of the relevant lands in a manner agreed between the parties.

In this connection the Department of External Affairs specifically draws attention *inter alia* to the following principal conclusions of the Commission of Inquiry:

"(1) that the failure to restore the worked-out land to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;

(2) that there was no agreed or just settlement which exonerated the Partner Governments from the responsibility to rehabilitate the lands;

(3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed . . ."

The Government of Nauru is considering in detail the conclusions of the Report, and expects in due course to be able to make an announcement in principle as to the development of a co-ordinated plan for the rehabilitation of the worked-out lands as a whole. In the meantime the Department of External Affairs notes that the conclusions in the Report, in particular those referred to in the preceding paragraph, support the view which the Department has consistently maintained as to the responsibility for rehabilitation of the lands mined before 1968.

The Department of External Affairs wishes to record the continued determination of the Government of Nauru to proceed to the rehabilitation of the worked-out lands, so as to secure the future of the Nauruan people. In that regard, the Department again calls upon the Australian Government to accept its responsibilities and to co-operate to this end. The Department stands ready to discuss in detail the forms which such co-operation might take.

The Department of External Affairs of the Republic of Nauru avails itself of this opportunity to renew to the Australian High Commission the assurances of its highest consideration.

Nauru.
20th December, 1988.

Certified correct:

(Signed) V. S. Mani,
Agent for the Republic of Nauru.

13 May 1989.

Appendix 3

AUSTRALIAN NOTE OF 3 MARCH 1989

(See paragraph 42)

AUSTRALIA

224/1/2

Note No. 16/89

The Australian High Commission presents its compliments to the Department of External Affairs of the Republic of Nauru and has the honour to acknowledge receipt of the Department's Note No. 167/1988 of 20 December 1988 and the accompanying copy of the Report of the Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru.

The Australian Government will study the Report, but meanwhile it wishes to recall the statements in the High Commission's Note of 27 July 1987 and to reserve its position generally in relation to the Report and the Department's Note No. 167/1988 of 20 December 1988.

The Australian High Commission avails itself of this opportunity to renew to the Department of External Affairs of the Republic of Nauru the assurances of its highest consideration.

Nauru,
3 March 1989.

Certified correct:

(Signed) V. S. MANI,
Agent for the Republic of Nauru.

13 May 1989.

MÉMOIRE DE NAURU

MEMORIAL OF NAURU

NOTE ON SOURCES

The following works are cited frequently in this Memorial, and copies of them have been lodged with the Registrar of the Court for convenient reference:

B. Macdonald, *In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Paper No. 3, 1988

Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru, *Report*, 10 vols., 1988

M. Williams & B. Macdonald, *The Phosphateers*, Melbourne University Press, Carlton, 1985

N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970

NOTE ON LEGISLATION

In this Memorial the abbreviations "(Cth)" and "(Nau)" are used for legislation applying to Nauru. The first refers to legislation of the Parliament of the Commonwealth of Australia enacted for Nauru under the territories power in the Australian Constitution (section 122): e.g., Nauru Act 1965 (Cth). The second refers to ordinances made by the Australian Administrator and applying to Nauru: e.g. Lands Ordinance 1921 (Nau). Laws made by the Parliament of Nauru after independence are cited in the following form: Customs and Adopted Laws Act 1971 (Nauru).

Volume 1

INTRODUCTION

1. In a Note dated 20 May 1989 (Annexes, vol. 4, Annex 80) addressed to the Australian Government, the Government of Nauru reported that it had lodged an Application with the International Court of Justice in pursuit of its claim for rehabilitation of the phosphate lands in Nauru mined out before the independence of Nauru. In this Note the Applicant State stated that it wished to record "that it has taken this step reluctantly and only after repeated efforts and requests, dating back to Nauru's independence in 1968, aimed at achieving a diplomatic settlement of the claim".

2. The relevant correspondence appears in Annexes, vol. 4, Annex 80 of the present Memorial.

3. The Australian Note dated 31 May 1989 in response to the Nauruan Note dated 20 May 1989 included the following assertions:

> "The Australian Government recalls that the report of the Commission of Inquiry into the question of Rehabilitation is a complex and lengthy document which was not received in Australia until February 1989. The report raises many difficult issues of fact and law which require consideration by Ministers and Departments of the Australian Government. Proper consideration of the report in the view of the Australian Government requires longer than the period that has elapsed.
>
> Moreover, the Department's Note No. 167/88 dated 20 December 1988 indicated that the Government of Nauru had not completed its own consideration of the report and intended to provide further advice on its position. The Australian Government had not received any further notification in this regard prior to the advice from the Deputy Registrar of the International Court of Justice that Nauru had commenced proceedings against Australia on 19 May 1989.
>
> In the meantime the commencement and continuation of legal proceedings against Australia in the International Court of Justice can only make discussions between Australia and Nauru of the matter more difficult. The Australian

> Government therefore expresses the hope that Nauru will reconsider the question of proceedings in the International Court of Justice. If proceedings are to continue, the Australian Government will have no option but to take all necessary steps to protect its legal position."

4. In a Note dated 19 June 1989 the Government of Nauru commented as follows on the views expressed in the previous Australian Note:

> "The Department wishes to record that the legal position of the Republic of Nauru with respect to the phosphate lands mined before Independence is a longstanding one, which was restated in the Department's Note No. 167/1988 in terms which were not dependent on (though they were consistent with) the conclusions of the Commission of Inquiry. As the High Commission's Note of 31st May, 1989 recalled, the consistent reponse by the Commonwealth of Australia to that demand has been that Australia was cleared of responsibility by the Nauru Phosphate Island Agreement of 1967, a view which Nauruan representatives denied at the time and which the Republic of Nauru has consistently denied since Independence. In these circumstances there is clearly a fundamental difference between the two Governments on an issue of principle, the resolution of which is apt for judicial settlement.
>
> The Department wishes to record its view, a view which it understands to be shared by the Commonwealth of Australia, that judicial settlement of disputes is an appropriate method of resolution of disputes between friendly countries and that the commencement of proceedings in a particular matter not only has no adverse implications for the general relations between the states concerned, but does not prejudice continued discussions between the parties with a view to the resolution of the dispute in question by other agreed means. The Department wishes to reaffirm its willingness to discuss with the Commonwealth of Australia the ways in which the Australian responsibility with respect to the lands in question might be carried out.
>
> On a point of detail, the Department notes that it provided a copy of the Report of the Commission of Inquiry to the High Commission on 20th December, 1988."

5. In its Order dated 18 July 1989 the Court fixed time-limits for the written procedure in this case. The Government of the Republic of Nauru has the honour to present this Memorial in accordance with the Order of the Court.

PART I

AN HISTORICAL ACCOUNT OF NAURU'S RELATIONS WITH EXTERNAL POWERS

PART I

CHAPTER 1

FROM COLONIZATION TO THE COMMENCEMENT OF THE MANDATE

Section 1. Introduction

6. The Island of Nauru constitutes the total land territory of the Republic of Nauru. It is situated in the Central Pacific, just 42 kilometres south of the Equator, and has a land area of 21 square kilometres.

7. In the latter part of the nineteenth century it was populated by its indigenous people in numbers somewhere between twelve and fourteen hundred. Contact with the outside world to that time had been spasmodic -- islanders blown off course from neighbouring Banaba (otherwise known as Ocean Island) and Kiribati (formerly the Gilbert Islands), the occasional whaling ships seeking food and water, and the odd European beachcomber and trader. Owing to its substantial forests and lush tropical growth, it was known to European explorers as Pleasant Island, and was so marked on contemporary charts.

8. From 1888, it came under German control and remained under the control of external powers, Germany, Great Britain, Australia, New Zealand (and briefly, from 1942-1945, Japan) until it achieved independence in 1968. Phosphate rock was discovered on Nauru in 1900 and thereafter the island became increasingly important as a principal supplier of phosphate rock to Australia and New Zealand, both of whose soils were deficient in phosphorous. In World War I, Nauru was seized from Germany by the Allied Powers and then by the Japanese in World War II, when it was relentlessly bombed by the Allies to prevent the production and export of the phosphate rock to Japan. To the present time, it remains the principal supplier of rock phosphate to both Australia and New Zealand.

9. Nauru is a raised atoll composed of limestone with a mantle of phosphate rock. On the topside plateau of Nauru, the sea of dolomitised limestone pinnacles is smothered for the most part, before mining, by a mantle of phosphate rock up to 24 metres thick. The phosphate was probably formed from avian guano dating back some 300,000 years, but there is evidence that the island has been submerged twice below sea level. The phosphate rock is formed only on the plateau about 60 metres above sea level and is renowned for its purity and consistency. The impurities have been removed by leaching or action of the sea when the island was submerged. Most of the phosphate rock is granular, but hard precipitated rock phosphate is also found.

Section 2. The German Period[1]

A. Nauru Placed within the Marshall Islands Protectorate

10. Under the Anglo-German Declaration of 6 April 1886 (*British and Foreign State Papers* vol. 77 p.42)[2], a line of demarcation was drawn in the Central Pacific extending from the Solomon Islands in the south to a point north and west of the Marshall Islands. Territory to the west of the line was deemed to be within the German sphere of influence, territory to the east within the British. The line brought the island of Nauru within the German sphere of influence. A further Declaration signed on 10 April 1896 provided that there was to be reciprocal freedom of trade in the possessions and protectorates in the area (*British and Foreign State Papers* vol. 77 p.44). The inclusion of Nauru within the German sphere was apparently deliberate rather than fortuitous. The original demarcation line had been drawn to the west of Nauru, placing the island within the British sphere of influence. Germany insisted on a modification to bring Nauru under its control in view of the activity of German traders there, and Great Britain agreed. (Deutsche Handels & Plantagen Gesellschaft der Südsee-Inseln zu Hamburg to Royal Prussian Ambassador, 4 October 1887, German Central Archives, Nauru, German Administration Official Records 1898-1916, Pacific Manuscripts Bureau, Australian National University, Canberra.)

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[1] Part I of this Memorial constitutes a historical account.

[2] References are provided for the facts stated and the assertions made, but only references of particular significance to this Memorial are matched by documents included in the Annexes. Other documents referred to will be made available to the Court and the Respondent State upon request.

11. The Imperial German Government by proclamation placed the Island of Nauru within the Protectorate of the Marshall Islands on 16 April 1888.[1] However the actual occupation and control of Nauru by Imperial Germany could be said to date from 1 October 1888, with the arrival of the Imperial German Commissioner from Jaluit in the Marshall Islands. In the usual manner of German Colonial administration the large German trading company, Jaluit Gesellschaft, played a major role in financing the administration of the protectorate and as a result obtained a number of economic privileges. (See para. 14.)

12. In 1906, as part of a reorganisation of German colonial administration in the Pacific, the Marshall Islands Protectorate, including Nauru, was placed under the administration of the German Colony of New Guinea with its administrative centre at Rabaul.

B. LAND AND THE GERMAN ADMINISTRATION

13. The central feature of Nauru when the Germans arrived was the settled ownership of land. Occupation was settled and land carefully divided into individually owned blocks. There was no ownerless land. This was no new phenomenon. Nauruan society before European contact had a developed system of land tenure with strong principles of succession on death, enforced by sanctions and chiefly authority. Under the German administration, a *Grundbuch* was compiled of some 1666 separate units of land holdings. Traditional ownership was recognised by the German administration, and dispute settlement by the German magistracy took full account of local customary law. (See paras. 16, 225-228.)

14. Trading companies, such as Jaluit Gesellschaft, were accorded an important role under the German *Schutzgebiete* system. In return for financing the administration, the company would obtain significant economic privileges. In the case of the Jaluit Gesellschaft it was accorded concessionary rights by the agreement of the Reich Chancellor in 1888 (Agreement between the Imperial German Government and Jaluit Gesellschaft, 21 January 1888, referred to in Agreement between King George V & Others and Pacific Phosphate Company Ltd, 25 June 1920, First Schedule, National Archives of Fiji, Pacific Phosphate Company, see

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[1] In German colonial law, the expression *Schutzgebiete*, meaning "a protected territory" was preferred to "colony".

Annexes, vol. 4, Annexes 45). In accordance with those rights Jaluit Gesellschaft could take possession of ownerless land. It also had the right to fish for pearl shell and to exploit guano deposits in the Marshall Islands and Nauru. In 1888, however, there was no great expectation of phosphate operations on Nauru.

15. Sovereign power was exercised over territories with the status of *Schutzgebiete* by the Emperor in the name of the German Reich. In practice, the *Schutzgebiete* were controlled by the Imperial Chancellor, who exercised the powers of sovereignty possessed by the Emperor. His instructions were carried out by the German Colonial Office through resident Imperial officials.

16. So far as indigenous peoples were concerned, German law applied only when such laws were specifically made applicable by Imperial ordinance (*Schutzgebietegesetz* 1900 Article 4, *Deutsche Kolonial Gesetzgebung*, vol. 1, pp.23-28.) The principle was that the private and customary land rights of the indigenous people continued after occupation, unless there was an Imperial ordinance to the contrary. Thus in the case of indigenous land rights, existing rights and titles were recognised on the basis of customary law. This was the case in Nauru. The German administration was careful to protect the rights of the indigenous population with respect to land. A registry of land holdings was kept and any land held by a non-Nauruan was also listed. In 1912 of the non-Nauruan holdings, three properties belonged to the *Fiscus*, two to an individual trader, three to the Pacific Islands Company, four to the Roman Catholic Mission, and five to the Protestant Mission; in total about five hectares. This was the full extent of non-Nauruan land holding.

C. JALUIT GESELLSCHAFT AND THE PACIFIC PHOSPHATE COMPANY

17. An English company, the Pacific Islands Company, first discovered rock phosphate on Ocean Island (Banaba) and Nauru in 1900. (M. Williams & B. Macdonald, *The Phosphateers*, Melbourne University Press, Carlton, 1985, pp.30-40.) The company persuaded the British to annex Banaba, which was on the British side of the 1886 demarcation line, and to give that company exclusive mining rights. But with Nauru it was necessary for the company to make overtures to Jaluit Gesellschaft, which it did. As a result, in 1900 Jaluit Gesellschaft assigned its rights in respect of phosphates to the

Pacific Islands Company (which in 1902 became the Pacific Phosphate Company). In return for the assignment the Company was to pay Jaluit Gesellschaft a royalty per ton for phosphate mined.

18. The Concession of 1900 was due to expire on 31 March 1906. In November 1905, a new concession was granted to Jaluit Gesellschaft for a period of 94 years, with effect from 1 April 1906. The 1905 Concession provided as follows:

> "The Jaluit Gesellschaft may, with the consent of the Imperial Chancellor, without prejudice to its continued responsibility for the duties imposed on it by this concession, transfer the exercise of its rights to third parties."
>
> (Contained in Agreement between King George V & Others and Pacific Phosphate Company Ltd, 25 June 1920, First Schedule, National Archives of Fiji: Pacific Phosphate Company: see Annexes, vol. 4, Annex 43.)

19. On 22 January 1906, after approval had been obtained from the Imperial Chancellor, Jaluit Gesellschaft assigned the rights derived from the 1905 Concession to the Pacific Phosphate Company. (See Annexes, vol. 4, Annex 44.)

20. Under the agreement between Jaluit Gesellschaft and the Pacific Phosphate Company, the Company was to fulfil its duties in accordance with the Concession. Jaluit Gesellschaft obtained significant shareholdings in the Company, a seat on the Board of the Company and a capital payment on the signing of the Agreement.

21. In an amending agreement of February 1906 (See Annexes, vol. 4, Annex 44) Jaluit Gesellschaft was to be paid a royalty of one shilling per ton of phosphate shipped out of Nauru and Ocean Island. At the time of concluding the main agreement, Jaluit Gesellschaft and the Imperial German Government had learnt of, and understood the extent of, the phosphate field. The Agreement represented a compromise between the basic interest of Jaluit Gesellschaft in copra and trade and that of the Pacific Phosphate Company in the exploitation of rock phosphate, the market for which was going to be largely Australia and New Zealand. The Agreement not only gave Jaluit Gesellschaft an interest in the Company, but also in the Company's mine in Ocean Island (Banaba). At the same time, Jaluit consolidated its monopoly in copra and trade throughout the Marshall Islands *Schutzgebiete*. Mining by the Pacific Phosphate Company was due to

commence on Nauru in 1907. On Ocean Island (Banaba) mining had begun as early as October 1900.

D. GERMAN MINING LAWS

22. Meantime, the mining laws of Germany had been undergoing some change. In principle German law separated wealth-producing minerals from the ownership of land. A three-fold classification of rights existed: ownership of land, ownership of minerals and the right to work the minerals. Basically there was freedom to mine, but under the Prussian General Mining Law of 1845, for example, this freedom was curtailed by a number of legal requirements.

23. The original Agreement between Germany and Jaluit Gesellschaft gave to the latter, *inter alia*, the right to exploit the existing guano deposits, and was expressed to be "irrespective of the vested interests of others". At that stage the mining of rock phosphate was not contemplated. Exploiting guano deposits was not much more than a collecting operation. Furthermore, guano was not considered to be a mineral outside the disposal of the landowner, such as gold, silver or iron.

24. A major change occurred in 1907 with the promulgation of the Imperial Mining Ordinance for the African and South Sea Protectorates of 1906 (*Deutsche Kolonial Gesetzgebung*, vol. 10, pp.36-55). Phosphate was then declared to be excluded from the landowner's control. In other words, it became a free mineral. Whilst Jaluit Gesellschaft attempted to escape some of the more stringent provisions of the 1906 Mining Ordinance, a supplement to the 1905 Concession was added in 1907, which made clear the extent of the application of the 1906 Mining Ordinance to the 1905 Concession. That supplement (*Deutsche Kolonial Gesetzgebung*, vol. 11, pp.121-123) stated as follows:

> "The exclusive right of the Jaluit Company according to the concession of 21st November 1905 to exploit the existing Guano (Phosphate) deposits in the protectorate of the Marshall Islands, irrespective of the vested interests of others, shall be supplemented and confirmed on request of the Jaluit Company with effect from 1st April 1906, after the Imperial Bergverordnung [Mining Regulations] of 27th February 1906, (R.G. p.363) for these protectorates came into effect on 1st April 1906. In this area only the sections 1 II to 3d, 2, 52-56, 58,

> 60, 69-89, 91, 92 and 96 of the abovementioned Mining Regulations shall be applied to the Guano (phosphate) extraction.
>
> The content of the concession remains otherwise unaffected."

25. Articles 69-89 of the Ordinance were thus made applicable to phosphate extraction in Nauru. These Articles set out the obligation of the miner to the landowners. In particular, Article 78 provided for compensation for the reduced value to the surface use of the land arising out of the mining operations. This Article applied to any form of open cut or cast mining, as in the case of the mining of rock phosphate at Nauru. Article 84 dealt with the subject of unintended damage which was not part of the operation itself. The nature and extent of liability for such damage would be governed by the general rules as to damages in private law under Article 249 of the Civil Code (*Bügerliches Gesetzbuch* [BGB]). In principle, the miner was held liable to restore the surface under the German doctrine of "*Naturalrestitution*". Such a responsibility was aimed at immediately and permanently restoring the affected property to an equivalent previous economic state. Where restoration was impossible then the miner was required to compensate the landowner in money damages measured by the diminished value to the landowner. In such cases, the obligor was the mine operator: where the operator was a different person from the holder of the mining title, the operator and not the title-holder was the obligor. Thus the Pacific Phosphate Company became the obligor through the assignment of the Concession in January 1906. Similarly under German law the obligations thus assumed by the Pacific Phosphate Company upon the assignment of the Concession would have devolved upon the successor, the British Phosphate Commissioners, in respect of all the mined land.

26. The German period illustrates at least some solicitude for the interests of Nauruans, at least as far as concerned the law relating to the rehabilitation of the mined land. Care was to be exercised in choosing the areas for initial mining by the commercial operator, under the supervision of local officials. The German Imperial Commissioner at Jaluit insisted that for every ton of phosphate mined by the Pacific Phosphate Company, the indigenous landowner on whose land the mining took place was to be paid 5 pfennigs. It is not clear what this payment was meant to represent. Both Jaluit Gesellschaft and the Pacific Phosphate Company saw it as a once and for all payment. These companies evidently had no interest in pursuing their responsibilities under the Mining Ordinance, and there was no indication

that any Nauruan owners were at all aware of their rights under the Mining Ordinance.

27. German law treated the right of action for compensation under Articles 78 and 84 of the Mining Ordinance as something more than a purely contractual matter between the miner and the landowner. The German State had interfered with the rights of the landowner to allow the miner access. The State therefore was at pains to compensate the injured party, the landowner, for a sacrifice rendered by the landowner for the public purpose of mining. The sacrifice imposed upon the landowner by the state as a consequence of licensing the mining activities consisted in the landowner being deprived of his right of enjoining interference with his property. Articles 78 and 84 were the *quid pro quo* for this deprivation. The German Civil Code therefore placed significant obligations upon the miner.

E. NAURU DURING WORLD WAR I

28. With the outbreak of World War I, Nauru was seized and occupied by a small force of Australian troops and placed under the control of a Commissioner responsible to the British High Commission for the Western Pacific, situated in Suva, Fiji. The island remained under British administrative control throughout the war and until June 1921, when the Mandate Administration was established. Phosphate mining by the Pacific Phosphate Company, now British staffed, continued through this period. In 1915, the German shares in the Company were placed in the hands of the Public Trustee as enemy property by the British Board of Trade. To ensure the continued operation of the Company through the war, all German stock was eventually sold at auction in Great Britain in July 1917 to a British shipping firm. (N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970, p.41.)

PART I

CHAPTER 2

THE LEAGUE OF NATIONS MANDATE

Section 1. Mandate Negotiations

29. With the conclusion of World War I and the defeat of Imperial Germany and the Ottoman Empire, the distribution of the former colonies of these two powers was at stake. The United States, in the person of President Wilson, pressed for a system of mandates administered through the proposed League of Nations. On the other hand, particularly amongst the Dominions of the British Empire, annexation was the most favoured course. In respect of South West Africa, New Guinea and Nauru, and Samoa, annexation was strongly advocated by South Africa, Australia and New Zealand. No greater advocate of annexation was to be found than Prime Minister Hughes of Australia. There was thus a strenuous confrontation between President Wilson and Prime Minister Hughes at the Paris Peace Conference. (P. Spartalis, *Diplomatic Battles of Billy Hughes*, Hale & Iremonger, Sydney, 1983.)

30. In the view of the United States, the mandatory principle embodied in the term "the sacred trust of civilisation" was overriding, and the interests of the indigenous peoples were accordingly to be treated as paramount. By contrast, Australia fought hard for outright annexation of both New Guinea and Nauru.[1] The argument for Australia with respect to New Guinea was

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[1] Hughes view of the matter is vividly expressed in his letter to the Governor-General of Australia on 17 January 1919:

> "I'm working up the case for the ex-German Colonies and the Pacific. Wilson's against us on this point too. But I hope we shall convince him. I think we shall for he is a man firm on nothing that really matters. He regards the League of Nations as the Great Charter of the World that is to be and sees himself through the roseate cloud of dreams officiating as the High Priest in the Temple in which the Sarcophagus or Ark containing the body or ashes of this amazing gift to Mankind is to rest in majestic seclusion for all time. Give him a League of Nations and he will give us all the rest. Good. He shall have his toy! What shape is [it] to assume you ask. None know. He least of all. This is the literal truth. He does not know, he is indeed incapable of reducing this ideal of his to any shape or applying it to the actual

based on national security, and encompassed both the Bismarck Archipelago and the Solomon Islands. On the other hand, with respect to Nauru the argument was unashamedly economic, as Hughes' memorandum to the British Empire Delegation makes clear:

> "The Islands which, under Lord Milner's scheme it is proposed to hand over to Australia, while essential to our safety, will involve us in very heavy expenditure for administrative and other purposes. Nauru, on the other hand, is an Island containing very valuable phosphate deposits. At the outbreak of war it was taken by Australian troops and has been since and still is garrisoned by our forces. Certain persons known as the Pacific Phosphate Co. Ltd. claim to hold a lease or authority to work these deposits but every attempt made by the Commonwealth Government to obtain production of the company's title has been unsuccessful.
>
> The position therefore is -- while Australia had thrown upon her the whole task of wresting this island with others from Germany and has been saddled with the whole cost of garrisoning and administrating them, the only means by which the returns would exceed the expenditure would under the proposed scheme be taken away from her. This, I am sure, will appeal to you as being, in all the circumstances, unfair, and I therefore venture to hope that the matter will be reconsidered and Nauru handed over to Australia."
>
> (Lloyd George Papers, Beaverbrook Library, London, F/28/3/34, 13 March 1919.)

31. The clash over these former German colonies produced a compromise within the overall framework of the Mandate system. This was the "C" class mandate, used for South West Africa, New Guinea, and Nauru which maintained the basic principle of the mandate or sacred trust, but allowed the mandatory powers to administer the territories "under the law of the mandatory state as integral portions thereof". The reasons for such a form of administration in these former German colonies was ascribed "to the sparseness of their population or their small size, or their remoteness from the centre of civilisation, or their geographical contiguity to the mandatory state" (Article 22 of the Covenant). The "C" class mandate did not contain the "open door" obligation, viz. "to secure equal opportunities for trade and commerce of all other members of the League of Nations". This was a source of some difference with the United States (see paras. 59-62).

> circumstances of mankind. He has 16 Secretaries and about 100 newspaper men -- his speeches are translated into all languages -- in every country of the world."

(Hughes to Governor General, 17 January 1919, N.L.A., Novar Papers, M.S. 696/2756, quoted in P. Spartalis, *Diplomatic Battles of Billy Hughes*, Hale & Iremonger, Sydney, 1983 p.122.)

32. Under the Treaty of Peace with Germany signed at Versailles on 28 June 1919, Germany by Article 119 renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions. But the Mandate for Nauru was not finally conferred until 17 December 1920 (Annexes, vol 4, Annex 27). It was awarded to "His Britannic Majesty", and it was only following difficult negotiations within the British Empire Delegation that the form of administration was finally settled.

33. The Australian Prime Minister, still seeking sole Australian control, was initially confronted with strong opposition from the British Colonial Secretary, Lord Milner, who proposed that Nauru should be administered by the High Commissioner for the Western Pacific through the adjacent Gilbert and Ellis Island Colony, which now included Ocean Island (Banaba). Lord Milner considered that the two phosphate islands should be regarded as "one economic proposition" (Lloyd George Papers, Beaverbrook Library, London, Lord Milner to Lloyd George, F/28/11/14, 22 April 1919). His proposal was for a British administration with a joint Commission of the three partners (Great Britain, Australia, and New Zealand) to control the phosphate mining, as the supply of phosphate rock was so large that "there is plenty for all three of us". He regarded the Australian requests for administrative control as absurd.

34. On the other hand, the Australian Prime Minister, after prompting his Cabinet in Australia, received the following Cabinet message with which to influence the British government.

> "Nauru is the one island whose receipts exceed its expenditure. Its phosphate deposit makes it of considerable value not only as a purely commercial proposition, but because the future productivity of our continent absolutely depends on such a fertiliser.
>
> Without a sure and reasonably cheap supply of phosphate our agriculture must languish and instead of people-ing our vast unoccupied interior population will continue to hug the sea board where they will be a comparatively easy prey to any predatory power."
>
> (Hughes to Milner, 3 May 1919, Lloyd George Papers, Beaverbrook Library, London, F/28/3/34.)

35. This bald economic argument was fortified later by comparing the vast agricultural needs for phosphate of Australia with those of New Zealand. Under pressure from Australia, the United Kingdom sought some

compromise, for New Zealand was not happy to leave Australia in sole control. (B. Macdonald, *In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Paper No. 3, 1988, p.12.) In June 1919, it was decided that the mandate would be administered jointly by Australia, New Zealand and the United Kingdom, but that Australia should appoint the first Administrator, who would hold office for five years.

Section 2. The Nauru Island Agreement of 1919 and the Establishment of the British Phosphate Commissioners

36. The future of the indigenous inhabitants of Nauru appeared to be, and indeed was, far from the concerns of the participants in this battle for access to the phosphate fields. The participants' real concern was demonstrated with the signing of the Nauru Island Agreement between Australia, New Zealand and the United Kingdom on 2 July 1919: see Annexes, vol. 4, Annex 26. The Agreement was approved by Acts of Parliament both in Australia and the United Kingdom and by a Resolution of both Houses of Parliament in New Zealand. (Australia: Nauru Island Agreement Act No. 8 of 1919; Great Britain: Nauru Island Agreement Act 1920, 10 & 11 Geo.V., Chap. 27; New Zealand, *Parliamentary Debates* (House) vol. 185, p.821, (Council) vol. 185, p.962.)

37. When introducing the Nauru Island Agreement Bill in the Australian House of Representatives, the Australian Prime Minister made the following observations:

> "Without phosphates Australia cannot progress. We are a progressive nation, and year by year require a greater supply of this necessity. This agreement which vests in us, as one of the parties, 42 percent of the total output of the island, gives us a most valuable asset, not one that endureth for a day, but an asset that will last for a century or more. It will give the agriculture of this country, at a reasonable rate, the material which is its very life blood. We shall be able to sell phosphates to the farmer at cost price; that is to say, the price at which the Commission is able to get the phosphatic rock into the ship, transport it to the port of discharge, and there turn the rock into the form in which it is immediately available for use by the farmer. The agreement, therefore, is of immense importance to the agricultural, and even the pastoral welfare of Australia and will be set-off against the huge expenditure which we incurred during the war."
>
> (Australia, *Parliamentary Debates (House of Representatives)* 24 September 1919, p. 12679.)

This view was supported by P.E. Deane, Secretary to the Australian Delegation at the Peace Conference, who wrote:

> "If we take a conservative figure and value the total deposits at 400,000,000 pounds -- Australia's share on the basis of allotment already agreed to is no less than 168,000,000 pounds... It is impossible... to estimate the enormous value of this island to Australia... It not only ensures to the farmer, free of all outside interference and control, his full requirements of phosphates -- but does so at cost price."
>
> (P.E. Deane, "Australia's Rights: The Fight at the Peace Table", Melbourne, undated, p.15.)

38. There was a measure of unease about the haste involved in the conclusion of the Agreement and the need for secrecy, at least on the part of the United Kingdom. By secret despatch to the Governor-General of New Zealand, Lord Liverpool, on 16 July 1919, the British Secretary of State for the Colonies sent a copy of the proposed Agreement and added this remark:

> "Confidential for the present, as it is undesirable that its existence should become known publicly before the whole question of Mandates has been finally settled."

39. The agreement anticipated the outcome, for it was concluded before the Mandate was awarded and before a sale by the Pacific Phosphate Company to the three governments had been effected, even though by Article 6 title to the phosphate was purportedly vested in the British Phosphate Commissioners.

40. When the Nauru Island Agreement Bill was debated in the British Parliament, considerable criticism was levelled at the Agreement on a number of grounds. One was the failure to submit the Agreement to the approval of the League of Nations. This was eloquently expressed by Colonel Wedgewood:

> "Everybody knows that this is a test case and if the British Empire came forward and said that they would submit this agreement, not merely as to the treatment of natives but also as to the closing of the door to the League of Nations and take their decision, then their action would do more to establish the League of Nations than anything else that they are likely to have it in their power to do. It would not only establish the British Government to the rest of the Governments of the world...Here we could take the first step and if we did take the first step in

> sacrificing our own material interests for the rest of the world other countries might act on the same lines."
>
> (Great Britain, *Parliamentary Debates, House of Commons*, vol. 132, col. 192.)

41. The criticism was also made that the Agreement violated the equal opportunities provision (colloquially termed the open door) of Article 22 of the Covenant. The Marquis of Crewe (Great Britain, Parliamentary Debates, House of Lords, vol. 41, cols. 633, 634, 635) and Lord Emmott (id., col. 637) were particularly critical of the monopoly provisions. But even more forthrightly, the former British Prime Minister, Asquith, made the following comment:

> "It is illegal in its origin, unequal in its operation; it is opposed in all respects to all of the letter and the spirit of the Covenant of the League of Nations..."
>
> (Great Britain, *Parliamentary Debates, House of Commons*, vol. 130, p.1323.)

42. Lord Robert Cecil moved an amendment that the agreement be confirmed "subject to the provisions of Article 22 of the Covenant of the League of Nations". This amendment was carried in the Standing Committee and accepted in both the House of Commons and the House of Lords: see Nauru Island Agreement Act 1920 (U.K.) section 1(1); Annexes, vol.4, Annex 33.

43. The Agreement was to prove exceedingly durable. Apart from one amendment in 1923 (see para. 51), it remained as the controlling instrument for Nauru until the passing of the Nauru Act 1965 (Cth) by the Australian Parliament (see paras. 150-151).

44. The Nauru Island Agreement Act passed through the Australian Parliament in September 1919, some fifteen months earlier than the actual conferring of the Mandate upon the British Empire on 17 December 1920 by the Council of League of Nations.[1] In fact, the Mandate administration of Nauru did not commence until mid-1921, when the Mandate entered into force. Technically, Nauru had been in a state of belligerent occupancy since 1914, administered through the British High Commission of the Western Pacific.

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[1] As the equivalent British Act was not passed until July 1920 and as ratification was required by the three parliaments, the Australian Act was not proclaimed until 28 October 1920.

45. It was not the intention of the Mandatory Powers in Nauru to allow the continued exploitation of the Nauru phosphate by a private British company, the Pacific Phosphate Company Limited. At the same time the Pacific Phosphate Company was aware that the cheap "at cost" pricing policy proposed under the 1919 Agreement for the entry of phosphate rock to the markets of Australia and New Zealand would cut into the production and profits from their other resource on Ocean Island. Accordingly the Company proposed to the Governments a complete sale of the relevant corporate interests on both Nauru and Ocean Island.

46. The sale was effected by an Agreement which commenced on 1 July 1920 (see Annexes, vol. 4, Annex 45). The Agreement was between King George V represented in various capacities by the High Commissioner of Australia, the High Commissioner of New Zealand, and the British Secretary of State for the Colonies, and the Pacific Phosphate Company Limited. It represented a sale of all the rights, assets and liabilities of the Company directly to the three Governments for a sum of £3.5m. From 1 July 1920, the company continued to mine the phosphate on Ocean Island and Nauru but did so on behalf of the three governments.

47. Then by way of an Indenture, dated 31 December 1920, between the Pacific Phosphate Company, King George V, represented by the same parties as in the previous above described Agreement, and three named individuals Dickinson, Collins and Ellis, who were the Commissioners appointed under the Nauru Island Agreement, the Company and the governments conveyed to the then present Commissioners all the various undertakings and assets on Ocean Island and Nauru. (See Annexes, vol. 4, Annex 46.)

48. In 1922, the Laws Repeal and Adopting Ordinance 1922 (Nau) was enacted. By section 3(1) of that Ordinance, German laws applicable on Nauru ceased to apply. The British Phosphate Commissioners, thereby, escaped any obligations created under German law in regard to restoration or compensation with respect to any future mined land. It is not clear from the presently existing knowledge of transactions relating to mined phosphate land in the period 1906 to 1922 whether any acquired right subsisted to a landowner by reason of the saving clause contained in section 3(2) of the 1922 Ordinance. Whatever the situation, there was no awareness by Nauruan landowners of any rights they might or might not have had arising

from the German law. For the text of the Ordinance see Annexes, vol4, Annex 35.

49. The purpose of the 1919 Agreement was in simple terms to provide the method by which Australia and New Zealand could obtain, with certainty and over a long period, the cheapest possible phosphate for each country's growing agricultural industry. The intent was gradually to carve away the core of an island to make the vast agricultural tracts of Australia and New Zealand fertile -- "to make the desert blossom like the rose". (Albert Ellis, *Ocean Island and Nauru*, Angus & Robertson, Sydney, 1935, p.89.)

Section 3. The Administration of Nauru and the Nauru Island Agreement

A. THE ADMINISTRATION OF NAURU

50. The Administration of the Island in accordance with Article 1 of the 1919 Agreement was placed in the hands of an Administrator. Under Article 1, the first Administrator was to be appointed by Australia for a term of five years; thereafter the three Governments were to decide on future arrangements. In the event, as a result of an amendment to the Agreement in 1923 and related arrangements between the three Governments, Nauru was administered throughout the period of the Mandate and Trusteeship by an Australian Administrator appointed by and exclusively subject to the directions of the Australian Government.

51. Owing to the unusual tripartite arrangement of the Mandate, there was concern expressed in the initial stages of the administration of Nauru as to the control that could be exercised over an Administrator. Did he act on instructions of the Government appointing him, or, in some way, of all three governments, or of none of them? The matter was resolved by a Supplementary Agreement concerning Nauru of 30 May 1923 (see Annexes, vol. 4, Annex 28), which read in part as follows:

> "IT IS HEREBY FURTHER AGREED between the three Governments as follows:-
>
> 1. All Ordinances made by the Administrator shall be subject to confirmation or disallowance in the name of His Majesty, whose pleasure in respect of such confirmation or disallowance shall be signified by one of His

> Majesty's Principal Secretaries of State, or by the Governor-General of the Commonwealth of Australia acting on the advice of the Federal Executive Council of the Commonwealth, or by the Governor-General of the Dominion of New Zealand acting on the advice of the Executive Council of the Dominion, according as the Administrator shall have been appointed by His Majesty's Government in London, or by the Government of the Commonwealth of Australia, or by the Government of the Dominion of New Zealand, as the case may be.
>
> 2. The Administrator shall conform to such instructions as he shall from time to time receive from the Contracting Government by which he has been appointed.
>
> 3. Copies of all Ordinances, proclamations and regulations made by the Administrator shall be forwarded by him to the Contracting Government by which he has been appointed, for confirmation or disallowance, and to the two other Contracting Governments for their information; and the Administrator shall supply through the Contracting Government by which he has been appointed such other information regarding the administration of the Island as either of the other Contracting Governments shall require.
>
> 4. All such reports as are required to be rendered to the Council of the League of Nations in virtue of Article 22 of the aforesaid Treaty of Peace or otherwise shall be transmitted by the Administrator through the Contracting Government by which he has been appointed to His Majesty's Government in London for presentation to the Council on behalf of the British Empire as Mandatory."

52. The effect of this supplementary agreement as to confirm that the Administrator was subject in his actions to the directions of the appointing Government. In fact Australia was the confirming, instructing and reporting Government in terms of the Supplementary Agreement of 1923 throughout the period of the Mandate and Trusteeship.

53. In fulfilment of his tasks, the Administrator was given general powers to make ordinances for the peace, order and good government of the Island but, significantly, subject to the terms of the Agreement. (Article 1). The only specific responsibilities given to the Administrator in the Agreement were the education of children, the maintenance of a police force and the establishment of courts, civil and criminal. All the expenses of this operation, including the Administrator's salary, were to be paid from the sales of phosphates or other revenue on the Island (Article 2). None of the partner governments would be called upon to pay anything toward the cost of administering Nauru. In fact, the cost of purchasing the interests in Pacific

Phosphate Company Ltd at £3.5m was treated as a loan to the Commissioners, which was repaid to the three Governments yearly from the receipts of phosphate. This was achieved through the establishment of a sinking fund for the redemption of capital, with interest being paid on the loan capital. (M. Williams & B. Macdonald, *The Phosphateers*, Melbourne, Melbourne University Press, 1985, pp.140-141.)

B. THE POSITION OF THE BRITISH PHOSPHATE COMMISSIONERS

54. The Nauru Island Agreement of 1919, in making provision for the mining of phosphate, provided for the appointment by each partner Government of one Commissioner: the three appointed were termed collectively the British Phosphate Commissioners. Each Commissioner held office during the pleasure of the Government by which he was appointed (Articles 3 & 4).

55. The Agreement purported to vest title to the phosphate in the Commissioners (Article 6). The Pacific Phosphate Company Limited was to be compensated by the three governments, each contributing according to a formula to be agreed upon (Article 7). In fact the formula was Great Britain 42%, Australia 42%, New Zealand 16%. That formula was also to be used in the case of future capital requirements, distribution of profit, and allotment of mined phosphate.

56. The Commissioners worked and sold the phosphate, but had to dispose of it in accordance with the agricultural requirements of the three Governments, thus setting up a monopoly linked to a tied market. Furthermore the Commissioners were to supply phosphate at a price no higher than that required to cover working expenses, interest on capital, a sinking fund for redemption of capital and any other charges -- in other words, at cost price, including in those costs the costs of the administration of the Island. There was no mention of royalties to the Nauruans, though they might perhaps have fallen in the category of "any other charges". Any production surplus to the needs of the governments was to be sold by the Commissioners "at the best price obtainable". These would be surplus funds and would be credited to the three Governments.

57. Article 13 provided:

> "There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement."

It was soon apparent that the Administrator had a very limited function, certainly in relation to the mining industry. For example, in 1925, the first Administrator acting in sympathy with the Nauruans, moved to proclaim an Ordinance limiting the depth of mining. The Nauruans were already disturbed at the extent of destruction. It was the view of the Administrator that to limit the depth of mining to 20 feet would make the land easier to reclaim. Pressure was immediately placed on the Governments by the British Phosphate Commissioners in response to this interference by an Administrator, and the Australian government took action not to confirm the Ordinance. (See paras. 521-539 for a more detailed discussion on the issue.) This was an early lesson that the British Phosphate Commissioners would brook no interference with mining and could count on the support of the Australian Government, to whom alone the Administrator was responsible.

58. The Commissioners held the view, supported by the three Governments and particularly Australia, that the mining enterprise was not a matter for report either to the Permanent Mandates Commission or to the Trusteeship Council. The accounts of the Commissioners were never revealed, even though repeatedly sought by the Trusteeship Council. (See further paras. 543-559.) The Commissioners at first took the view that matters relating to mining were not relevant to the mandate: later, when pressed, they resisted presenting full accounts on the basis that Ocean Island was an inseparable part of the enterprise and that Nauru accounts could not be separated out. The advent of the Visiting Missions in the trusteeship period flushed out more information, but this was still limited both in quantity and scope.

C. The Concerns of the United States and Australia's Response: The Bailey Opinion

59. The Nauru Island Agreement 1919 sat uneasily within the concept of the Mandate. Before the mandate administration was even under way, the United States, attempted to modify the system by its independent efforts. The mandate system, whilst supported by the United States in principle, was not accepted by that country in respect of "C" class Mandates. Moreover the United States, although a Principal Allied and Associated Power in terms of the Treaty of Versailles, had not ratified that Treaty.

60. Following lengthy correspondence between Great Britain and the United States ("Economic Rights in Mandated Territories" (Cmd. 1226, 1921)), the United States eventually put before Great Britain in 1923 a Draft Convention concerning the Territory formerly the German Protectorate of South West Africa, the Island of Nauru and the former German island possessions in the Pacific Ocean South of the Equator other than the Island of Nauru and former German Island of Samoa (Australian Archives, ACT, CRS A989, Item 44/735/321/4; Annexes, vol. 4, Annex 67). Article 8 of The Draft Convention provided:

> "Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate and in order to provide the territory with fiscal resources which seem best suited to the local requirements or, in certain cases, to carry out the development of national resources, either directly by the State or by a controlled agency, provided that there shall result therefrom no monopoly of the national resources for the benefit of the mandatory and its nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed."

61. This was an attempt to give the United States the benefit of the equal treatment article contained in the class "B" mandates. The Draft Convention and the submissions of the United States met with stiff resistance from the partner Governments, and were strongly and successfully opposed at the Imperial Conference in 1923. The Secretary of State made the position of the United States clear when he wrote to the British Minister, Earl Curzon, on 20 November 1920, in the following terms:

> "I need hardly refer again to the fact that the Government of the United States has consistently urged that it is of the utmost importance to the future peace of the world that alien territory, transferred as a result of war with the Central Powers, should be held and administered in such a way as to assure equal treatment to the commerce and to the citizens of all nations. Indeed, it was in reliance upon an understanding to this effect, and expressly in contemplation thereof, that the United States was persuaded that the acquisition under mandate of certain enemy territory by the victorious powers would be consistent with the best interests of the world.
>
> The establishment of the mandate principle, a new principle in international relations, and one in which the public opinion of the world is taking a special interest, would seem to require the frankest discussion from all pertinent points of view. It would seem essential that suitable publicity should be given to the drafts of mandates which it is the intention to submit to the Council, in order that the fullest opportunity may be afforded to consider their terms in relation to the obligations assumed by the Mandatory Power and the respective interests of all Governments which are or deem themselves concerned or affected."
>
> (Correspondence, "Economic Rights in Mandated Territories" (Cmd. 1226) p.8.)

62. The United States was not successful in negotiating bilateral arrangements with respect to the "C" class mandates, except in the case of Yap which was a Japanese mandate. (Prime Minister's Department Confidential Memo, "Territory of New Guinea -- Treatment of Foreigners & Foreign Interests", 31 March 1923, Australian Archives ACT, CRS A989, Item 44/735/321/4.) Nevertheless, its attempt to secure most-favoured-nation treatment and to prohibit monopolistic concessions by the Mandatory in "C" class mandates was a continuing issue. When the issue of the transfer of Nauru to the trusteeship system arose in the latter stages of the Second World War, it was clear that a careful strategy would have to be adopted to meet the expected opposition from the United States. It was in this context that Sir Kenneth Bailey, the Secretary of the Commonwealth Attorney-General's Department, in a secret minute in January 1944 to the Australian Attorney-General carefully reviewed the contretemps with the United States concerning the "C" class mandates (Pacific Conference Papers, January 1944, U.S. Interest in "C" Mandates, Australian Archives: ACT, CRS A989, Item 44/735/321/4; see Annexes, vol.4, Annex 57). At the conclusion of the minute he set out at the following propositions:

> "a) As a matter of strict law, the disposition of the former German colonies required the unanimous assent of the Five Principal Allied and Associated Powers;

> b) It is uncertain whether, in point of law, all five powers did assent in 1919 to the allocation to Australia and New Zealand of the Islands over which they now hold a Mandate; but that point is not of practical significance;
>
> c) The United States has never given its assent to the text of the Mandates issued by the Council of the League;
>
> d) The United States may probably be regarded as having waived for practical purposes any claim that the Mandates issued have never had any valid operation at all; but
>
> e) As a matter of practical politics, and having regard to the position of the United States as one of the Principal Allied and Associated Powers, any claims by the United States for an alteration of the Mandate or for securing special rights for citizens of the United States would have to be discussed on their merits."

These propositions carefully moved the debate away from the legal point of "unanimous assent" which was required in 1919, to the practical politics of the day in 1944. The difficulties that confronted Australia in the change from Mandate to Trusteeship are outlined in paragraphs 110-116 below.

D. THE PERMANENT MANDATES COMMISSION

63. At the first session of the Permanent Mandates Commission, the Secretary to the Commission also made a general statement on the mandates question. *Inter alia*, M. Rappard said:

> "The Mandatory Powers had assumed a responsibility similar to that of a guardian with respect to his ward. The interests of the natives were therefore of primary importance and the rights of all the members of the League must always be respected. It was in order to complete the League of Nations by a work of pacification that these Colonies were entrusted to certain Powers, subject to their securing equal opportunities for the trade and commerce of all the Members of the League, and subject, also to their being responsible to the League. Great moderation was exercised in this regard; the Mandatory Powers were only obliged to submit to the Council a single annual report on their administration."
>
> (League of Nations, Permanent Mandates Commission, *Minutes*, 1st Session, 1921.)

64. At its next session the Permanent Mandates Commission of the League gave its initial consideration to the Mandate for Nauru. The Secretary of the Commission stated that the League of Nations could only

recognise the British Empire as the true Mandatory in international law. (League of Nations, Permanent Mandates Commission, *Minutes*, 2nd Session, 1922, p.38.) This was reaffirmed by a member of the Permanent Mandates Commission, M. Orts, who said the Commission could only recognise as such the power designated in the Mandate -- namely His Britannic Majesty, otherwise the British Empire. (id., p.46.) But Mr Ormsby-Gore, the British representative on the Commission, took the view that for practical purposes Australia was the Mandatory Power and regarded itself as such. He reminded the Commission that there was no Government of "The British Empire" as such, and that it was presumably for the British Empire to choose one of the constituent Governments to administer the Mandate. (id., p.46.) The Chairman then raised the problem of rotation of Administrators foreshadowed in Article 1 of the 1919 Agreement. (id., p.47.) As has been seen, throughout the period of the Mandate, Australia alone appointed the Administrator and reported to the Permanent Mandates Commission.

65. At the same session of the Commission, serious doubts were raised as to the way in which the 1919 Agreement related to the Mandate. The very nature of the British Phosphate Commissioners was considered by M. Orts to be a derogation from the principle of economic equality. (League of Nations, Permanent Mandates Commission, *Minutes*, 2nd Session, 1922, p.37.) The 1919 Agreement, although known to the Secretary of the Commission, had not been officially communicated to the League of Nations. In considering the situation of the indigenous inhabitants, the Commission sought information as to what plans the Mandatory had for the indigenous population upon the exhaustion of the phosphate deposits. (id., p.48.)

66. After considering the Australian report and hearing the representative of Australia, Sir Joseph Cook, the General Report for 1922 of the Mandates Commission on "C" mandates made the following observations to the Council of the League:

> "This tiny island which is hidden in the vast extent of the Pacific, has only about 2,000 inhabitants. Its sole wealth -- and it is considerable -- consists in vast and rich deposits of phosphates. The Mandate for this island was conferred by the Principal Allied and Associated Powers upon the British Empire, which delegated the working of this mineral wealth to Australia, Great Britain and New Zealand. These three Governments have devolved upon Australia the responsibility for the administration for a first period of five years. From information supplied by the Mandatory Power, the Commission finds ground for fear that the fundamental principle of the institution of Mandates may, as regards its application to this

> island, be prejudiced in two ways. It fears on the one hand that the material wealth of this island and the small number of its inhabitants may induce the mandatory Powers to subordinate the interests of the people to the exploitation of the wealth. It is, therefore, not without deep concern that it considers the question whether the well-being and development of the inhabitants of this island, which, in the words of the Covenant 'form a sacred trust of civilisation', the accomplishment of which it is the Commission's duty to safeguard, are not in danger of being compromised.
>
> It is moreover, concerned with the consideration of the question whether the mandatory Power, by reserving the ownership and exclusive exploitation of the resources of this territory to itself, has brought its policy into true harmony with the requirements of the Mandate which, in accordance with the Covenant, it should exercise on behalf of the whole League of Nations."
>
> (League of Nations, Permanent Mandates Commission, *Minutes*, 2nd Session, 11th Meeting, 1922, p.55.)

67. In discussions on Australia's Second Report, M. Rappard reminded the Commission that according to the terms of the Covenant, the Mandate was a system of tutelage and that tutelage implied a disinterested activity. (League of Nations, Permanent Mandates Commission, *Minutes*, 3rd Session, 1923, p.56.) Sir Frederick Lugard commented that if the principle of disinterestedness were abandoned, there would in reality exist a disguised form of annexation. (id., p.56.) M. Orts believed that the principle of disinterestedness would involve a condemnation of the system in force in Nauru, and possibly of the exploitation of the phosphate in the Pacific Islands. (id., p.57.) The Commission, after debate, adopted the following declaration of principle.

> "It would be contrary to the spirit of disinterestedness which is the characteristic of the system of mandates for a mandatory state to create, under cover of its mandate, in the territory entrusted to it for administration, a Government enterprise of an industrial or commercial character, the profits of which were credited to the central budget of the Mandatory State."
>
> (League of Nations, Permanent Mandates Commission, *Minutes*, 3rd Session, 1923, p.59; Annexes, vol. 4, Annex 24.)

68. The Mandatory had set up a state monopoly, the effect of which was to prevent other League of Nations members gaining access to the phosphate reserves, or, access to the fruits of the production. The phosphate production resulted in sales in Australia and New Zealand, with a little to Great Britain,

at markedly preferential rates in relation to the world market price. (League of Nations, Permanent Mandates Commission, *Minutes*, 22nd Session, 1932, p.45; id., 23rd Session, 1933, p.3.) This was not only strongly objected to by the United States (see paras. 60-62) but also created a sharp diplomatic exchange with France, when Australia and New Zealand, through the British Phosphate Commissioners, refused to import phosphate from the French Pacific Island of Makatea in 1934.

69. With the increase in production at Nauru in the late 1920s and early 1930s the need for the British Phosphate Commissioners to buy supplementary supplies of phosphate from La Compagnie Française des Phosphates de L'Oceanie at Makatea, French Polynesia, for the Australian and New Zealand markets, was at an end, particularly as that phosphate had to be bought at the established world market price. This situation produced a strong diplomatic reaction from the French Government. The diplomatic note from the French Ambassador in London to the British Foreign Office (Public Records Office, London: Dominions Office 140/258) is set out in Annexes, vol. 4, Annex 75.

70. In that note, the French Government reiterated the United States objection at the lack of an "open door". But it took the matter further, criticising the manner of administering the Mandate on the basis that it was contrary to the principle implicit in a mandate for the mandatory powers directly to profit from it, particularly at the expense of the subjects and intended beneficiaries of the Mandate:

> "En s'accordant un régime de faveur pour l'achat des phosphates nécessaires à leur agriculture, le Royaume-Uni, L'Australie et la Nouvelle-Zélande tirent du mandat un profit direct, ce qui est manifestement contraire aux principes selon lesquels doit d'exercer la gestion de la puissance mandataire. Il y a là une subvention indirecte dont bénéficient les trois Gouvernements, à la charge du territoire sous mandat."
>
> (Public Records Office, London: Dominions Office 140/258; Annexes vol. 4, Annex 75.)

71. Between 1922 and 1939, with improved production techniques and greater demand in both Australia and New Zealand, the annual export tonnage of phosphate rock grew from 182,170 tons in 1922 to 932,100 tons in 1939. The total exported for that period was more than 7 million tons. It had become clear to the Permanent Mandates Commission that a

considerable degree of destruction was being wrought on the Island. But this was even clearer to the indigenous Nauruans who were able to witness during the Mandate period the extraordinary damage being done to their land.

72. The Permanent Mandates Commission addressed the matter of mining in the presence of the Australian accredited representative on a number of occasions during the review of the Annual Report of Australia between 1935 and 1939.

73. In 1935, in answer to a question in the Permanent Mandates Commission whether the Phosphate Commissioners were obliged to return lands in a state fit for agriculture, the Australian reply was that there was "apparently" no obligation to put the lands in a cultivable state before returning them to the native owners. (League of Nations, Permanent Mandates Commission, *Minutes*, 29th Session, 3 - 18 Jan. 1935, p.35.)

74. In 1936, M. Rappard asked whether there was any danger within the foreseeable period that the phosphate deposits would be exhausted, so that the inhabitants would be deprived of their means of subsistence. This was believed to be a fundamental problem. The Australian representative replied that land was generally classified either as phosphate bearing or as coconut land. When phosphate land had been worked out and returned to its owners it was classified as coconut land. It was possible that in the future the production of copra would become an industry of the island, but whether it would be sufficient to support the population he was not in a position to say. M. Rappard in response indicated that even on the most optimistic estimate the population was unlikely to be able to live on the proceeds from copra exports. (League of Nations, Permanent Mandates Commission, *Minutes*, 29th Session, 27 May - 12 June 1936, p.33.)

75. In 1937, noting the substantial increase of the exports of phosphates, the Commission again drew attention to the question of the area which would be available for native habitation or cultivation and expressed concern about what would happen when the deposits were exhausted. On this occasion, the Australian representative indicated that there was a fertile section surrounding the island in which there was ample accommodation for a much larger population than the present total of inhabitants, and that it was hoped that this fertile section of some 1,200 acres would in fact produce more food bearing trees and food. The Australian representative also indicated that one should not fear the exhaustion of deposits, for the former

Administrator had indicated on his calculations in 1928 an estimated life for phosphate deposits of 300 years. Nevertheless the Permanent Mandates Commission again asked the Australian representative how soon worked out phosphate land would become fit for use as agricultural land. The Australian representative said that he was unable to say with any certainty, but that these areas were entirely uninhabited and very little used by the natives. He added that the worked out fields would not in the ordinary course be able to be put into a fit state from agriculture but that in the course of time there would be some plant recolonisation. (League of Nations, Permanent Mandates Commission, *Minutes*, 31st Session, 31 May - 15 June 1937, pp. 50-51.)

76. In 1938 the Australian representative, on the basis of a recalculation of phosphate land, said that estimates of reserves of phosphate were probably pure speculation, but that the previously stated figure of 300 years should be reduced to 230 or 240 years. He also stated that some land had been returned to the land owners but this was uninhabitable and not fit for agriculture. The phosphate area was waterless, uninhabited and little used by Nauruans. However in answering a question on food crops in which he had indicated that it was possible, particularly on the fertile land, for the growth of local foods and fruit, he added that it was still an open question whether worked out land could be made fit for cultivation. (League of Nations, Permanent Mandates Commission, *Minutes*, 34th Session, 8-23 June 1938, pp. 19-20.)

77. In 1939, the new Australian representative before the Permanent Mandates Commission, Mr. J.R. Halligan was asked questions about living space, the duration of phosphate deposits, and the use of mined-out land.

> 'Mlle. Dannevig asked whether there was sufficient room left on the island for the native population.
>
> Mr. Halligan pointed out that Nauru was an island with a circumference of some twelve miles. The outer rim was formed by a coral reef which was exposed at low tide. Then came a beach and a strip of fertile land some 200 to 800 yards wide running up to a plateau in the centre of which the phosphates were deposited. The natives lived on the fertile strip where they had sufficient accommodation and were able to grow their crops of coconuts and pandanus palm.
>
> M. van Asbeck recalled the question asked by the Chairman at the thirty-fourth session as to whether worked-out land was permanently unsuited for cultivation of any kind. Was any more recent information available on that point?

> Mr. Halligan referred to the photographs contained in the annual report for 1926, which showed that the removal of phosphate deposits left pinnacles of coral exposed which were obviously unsuitable for cultivation.
>
> Count De Penha Garcia asked whether the Administration had made any calculation of the probable duration of the phosphate deposits.
>
> Mr. Halligan replied that several rough estimates had been made of the probable life of the phosphate fields. Much would depend on the depth of the deposits and the rapidity of working. At the present rate of output, it could be calculated that the deposits would probably last up to eighty or even to a hundred years."
>
> (League of Nations, Permanent Mandates Commission, *Minutes*, 36th Session, 8-29 June 1939, p.166, 169, 170.)

78. Clearly the Australian administration had not analysed with any clarity the situation facing the Nauruans at the point of the exhaustion of the phosphate fields, nor had the Administration shown any concern over the state of the worked-out land upon its return to the landowner. The answers to the Commission's queries display inconsistency and little appreciation of the growing problems for the Nauruans of increasing population, lack of domestic foodstuffs, water, and the diminution of viable land area.

79. The last year of phosphate production before the Japanese occupation was 1941. Thereafter there was no further mining until after the conclusion of World War II.[1] Export of phosphate rock was to be resumed in 1947.

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[1] Following the outbreak of World War II, there was no further reporting with respect to Nauru to the Permanent Mandates Commission after the 36th Session in 1939. The next time that Nauru was reported on was to the Trusteeship Council in 1948 following the conclusion of the Trusteeship Agreement in 1947. There was thus almost a decade without supervision which included the Japanese occupation. No mining took place between 1941 and 1947.

PART I

CHAPTER 3

THE LANDS ORDINANCES

Section 1. Land Rights and Mining Rights under the 1919 Agreement

80. Crucial to the requirements of the British Phosphate Commissioners was access to the phosphate. The arrangements governing the Pacific Phosphate Company access were outlined in paras. 45-48, 55. But now there was established a state monopoly organisation owned by the Administration under the 1919 Agreement. Already Article 6 of that Agreement had purported to vest title to the phosphate deposits on the Island of Nauru:

> "The title to the phosphate deposits on the island of Nauru and to all land, buildings, plans and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners."

Article 7 further provided that:

> "Any right, title or interest which the Pacific Phosphate Company or any person may have in the said deposits, land, buildings, plant and equipment (so far as such right, title and interest is not dealt with by the Treaty of Peace) shall be converted into a claim for compensation at a fair valuation."

81. In fact, compensation in relation to rights to deposits and plant and equipment was finally negotiated by the three governments with the Pacific Phosphate Company at a figure of £3.5 million.

82. The Nauru Island Agreement paid no regard to questions relating to Nauruan land ownership or any customary law existent in Nauru with respect to the extent of ownership. The Nauruan people do not figure in the Agreement, and certainly were not consulted before or after its conclusion.

83. Article 6 might be read as an expropriatory provision of both phosphate deposits and the land within which these deposits are present. But there was in existence an established individual land ownership system in relation to all land areas of the island. This had been recognised by the German Colonial Government and been recorded by it in a register. (Grundbuch Marschall-inseln und Nauru, Australian National Library, Canberra.) It would, therefore, have been difficult, if not catastrophic, for an incoming administration to carry out an expropriation of private land.

Section 2. The Lands Ordinance 1921 (Nau)

84. One of the first acts of the Administrator was to proclaim the Lands Ordinance 1921 (Annexes, vol. 4, Annex 34). Under the Ordinance land could not be leased or sold without the consent in writing of the Administrator: if any such action were taken without consent of the Administrator, it would be absolutely void and of no effect.

85. So far as leasing was concerned, land could be leased for such periods as the Administrator approved. But the leasing regime had two arms, the one relating to phosphate-bearing lands, and the other to non-phosphate bearing lands. It was a matter solely for the Administrator to determine what lands were to be classed as phosphate-bearing.

86. The use of the concept of the lease is unusual. Not only did the Ordinance require the Administrator to consent to any lease of phosphate-bearing lands; it also stipulated the terms of any such lease. In practice, there was no semblance of the right of an individual Nauruan to bargain, and from 1927 (as a result of the Lands Ordinance 1927) the Commissioners had the unlimited right to "lease" phosphate-bearing land. Thus the terminology of leasehold was used to bring about an effective "taking" of the Nauruans' land.

87. Phosphate-bearing lands could only be leased to the British Phosphate Commissioners for a period terminating not later than 31st March 2000. That date coincided with the termination of the original concession of Jaluit Gesellschaft. In return for the "lease", the British Phosphate Commissioners paid to the landowner a lump sum at the rate of £20 per acre and a royalty on all phosphate shipped at the rate of threepence per ton. Twopence of this royalty was paid to the landowner, and one penny to the Administrator to be

placed in the Nauru Royalty Trust Fund. All trees and shrubs on phosphate-bearing land thus "leased" became the property of the British Phosphate Commissioners, and could be disposed of as the British Phosphate Commissioners deemed fit.

88. By contrast, the lease of non-phosphate bearing land was subject to the approval of the owner as well as the Administrator, and there was no restriction on the persons to whom such land could be leased. The conditions of the lease were laid down. There was to be an annual rental at a rate of 25 shillings per acre. Trees and edible fruits were to remain the property of the lessor, who in the daylight hours had the right to enter that land and pick the fruits. The lessor was not able to remove trees without the consent of the Administration. When removal was permitted, compensation was to be awarded the lessor according to a schedule of particular species of trees.

89. There was a marked difference between the two classes of land. Approximately four-fifths of land on Nauru was phosphate-bearing, and this was now subject to a monopolistic legal regime for the purpose of mining. This was to be compared with non-phosphate bearing land where the Administration saw the wisdom of attempting to protect the important and productive fruit bearing trees.

Section 3. The Lands Ordinance 1927 (Nau)

90. Upon the arrival of a new Administrator in Nauru in 1927, one of his first acts was to produce amendments to the Lands Ordinance 1921: Lands Ordinance Amendment Ordinance 1927 (Annexes, vol. 4, Annex 36). The effect of these amendments was to tighten the hold of the British Phosphate Commissioners, both as to phosphate-bearing lands and non-phosphate bearing lands. Apart from the Administrator continuing to determine what lands were to be classed as phosphate-bearing, the major powers of decision were now to be left to the British Phosphate Commissioners.

91. Under the amendments, the Commissioners had the right both to lease any phosphate-bearing land, to mine the phosphate thereon to any depth desired, and to use or export such phosphate. This removed the need for approval by the Administrator under the 1921 Ordinance. The reference to depth overcame the attempt by the former Administrator to limit depth by

an Ordinance in the previous year, which ordinance had been disallowed by the Australian Government. Where the Commissioners either wanted to use or stockpile phosphate, this could be done without the need to pay royalty. Royalty was only paid for material which was actually exported.

92. The British Phosphate Commissioners retained the right to remove trees on leased phosphate-bearing land, but now obtained the right, with the approval of the Administrator and landowner, which approval was not to be unreasonably withheld, to remove any trees on any other phosphate-bearing lands which the British Phosphate Commissioners required in connection with their operations.

93. Additionally, the British Phosphate Commissioners gained a right of way over any unworked, partly worked or worked-out phosphate bearing land required by the Commissioners for their operations, again with the approval of the Administrator and landowner, which approval was not to be unreasonably withheld.

94. In return for the lease, the British Phosphate Commissioners were to pay pro rata forty pounds per acre as a lump sum and a royalty in total of seven and one-half pence, of which four pence was to be paid to the landowner, one and a half pence to the Administrator towards the Royalty Trust Fund, and the remaining two pence to a new Nauruan Landowners Royalty Trust Fund. This latter fund was to be invested for twenty years, at the end of which time the interest accrued was to be paid half-yearly to the land-owner or his or her successors in title, with the capital remaining invested.

95. So far as non-phosphate bearing lands were concerned, these could, in accordance with the régime created by the 1927 Ordinance, only be leased to the British Phosphate Commissioners. The British Phosphate Commissioners were given the power to remove trees upon payment of compensation, based on a schedule of particular species. The rental for this land was fixed at the rate of three pounds per acre per annum.

96. There was another provision in the Ordinance that as soon as practicable all worked-out land not required for or in connection with the operations of the British Phosphate Commissioners was to revert to the landowners concerned. This was a matter of some contention for it was left to the British Phosphate Commissioners to determine the precise modalities

of its application. There was some concern that land was not returned "as soon as practicable". Any land so returned was neither cultivable nor habitable and for all practical purposes useless. See Annexes, vol. 2, Photographs 2-5.

Section 4. Impact of the Lands Ordinances

97. Against the background of the 1919 Agreement, the two Lands Ordinances were clear evidence both of the power and direction of the British Phosphate Commissioners and the Governments behind them. There was no bargaining power left to the Nauruans -- the more so when the Administrators, by direction or otherwise, gave their support to the development of the mining venture. It is true that Griffiths, as Administrator between 1921 and 1926, made some sort of stand, but he was quickly defeated by an Australian Government which would not entertain interference with the main purpose of administering Nauru, the mining of phosphate. (See further paras. 521-539 for a more detailed account of the dispute over the Lands Ordinances.)

98. The 1919 Agreement and the 1921 and 1927 Ordinances represented the sheet anchor of Australian administration of the phosphate industry on Nauru until the time of independence. Throughout the period of Australian administration up to independence in 1968, the Ordinances remained in force, except for some amendments to the rates of rental and royalty. (See Annexes, vol. 4, Annex 38.) At no time did the "lease rental" bear any equitable relationship to the damage done to the land, and in the case of phosphate-bearing land all that was available was a small lump sum payment. A "royalty" was paid but it was not based on any relationship to the worth of the phosphate extracted and was regarded by the Australian Government as a gratuitous payment, if not as illegal. (See, e.g., *General Assembly Official Records*, 8th Session, Supplement No.4 (A/2427), p.199; Nauru Talks 1965, p.19 (Annexes, vol. 3, Annex 2.) The "lease" was effectively a form of expropriation: what was handed back to the landowner by the British Phosphate Commissioners was, without rehabilitation, a worthless shell of what had been conveyed by lease.

99. The Nauru Island Agreement and the Lands Ordinances remained in force even after the Nauru Act 1965 (Cth). Section 26(c), (d), (e) of that Act specifically excluded matters relating to phosphate mining and its operation

from the oversight of the Legislative Council: see para. 151 below. Similarly, Articles 2 to 14 of the 1919 Agreement remained intact: the Nauru Island Agreement 1919 as such was not terminated until 9 February 1987 (see para. 470 below).

100. The effect of the legal regime which combined a single minded state monopoly, and ever increasing demand for phosphate meant the systematic destruction of the Nauruan environment, a process which threatened to engulf all but the narrow coastal rim of the Island. When it was eventually realised by Australia that the so-called "fertile" coastal strip was not sufficient to sustain a growing community whose previous total land area would eventually be reduced by four-fifths, the strategy adopted was to seek to remove the community from their home, rather than to rehabilitate the worked-out land. This had also been the final outcome determined for the neighbours of Nauru, on Ocean Island (Banaba), by a colonial government not subject to the international duties imposed by a mandate or trust. (See *Tito* v. *Waddell (No. 2)* [1977] 3 All E.R. 129.)

PART I

CHAPTER 4

FROM THE SECOND WORLD WAR UNTIL INDEPENDENCE

Section 1. The Japanese Occupation

101. Even before Japan's entry into World War II, Nauru had already been the scene of an attack by an armed German vessel on 27 December 1940, which caused considerable damage to the loading plant. As a result the Australian War Cabinet determined to erect fortifications on Nauru for the protection of the phosphate trade (Minute & Agenda for 16 January 1941, AWM 52, A.I.F. and Militia Unit War Diaries, 1939-45, Item No. 567/2/1: Defence of Nauru and Ocean Island.) That decision was communicated to New Zealand and the United Kingdom. It was recognized, however, that protection of the phosphate trade of both Nauru and Ocean Island (Banaba) would be virtually impossible once Japan entered the war. (Prime Minister's Cablegram 21.5.41, AWM 52, A.I.F. and Militia Unit War Diaries, 1939-45, Item No. 567/2/1: Defence of Nauru and Ocean Island.) As a result, Australia decided to evacuate most European personnel and carry out demolition of the phosphate installations (Cablegram 9 August 1941, AWM 52, A.I.F. and Militia Unit War Diaries, 1939-45, Item No. 567/2/1: Defence of Nauru and Ocean Island).

102. In December 1941, Japanese air attacks began and on 23 February 1942, the main evacuation of Europeans and Chinese took place. Only seven Europeans remained, including the Administrator and Medical Officer. Japan occupied Nauru with naval forces on 24 August 1942.

103. It was the intention of the Japanese to mine the phosphate and to ship it to Japan for their own agricultural purposes. This was thwarted, however, by demolition of the cantilevers and much of the phosphate installations by Australia in the period immediately before the Japanese occupation. Whatever remained intact was subsequently destroyed by incessant Allied bombing.

104. The Japanese brought in a large number of foreign workers, particularly Koreans, and in 1943 transported two thirds of the Nauru population to the island of Truk (31st/51st Battalion, AIF, War Diaries, History of Japanese Occupations of Nauru) in Micronesia, where they were used in forced labour.

105. The personal diaries of Patrick Cook (31st/51st Battalion, AIF, War Diaries, Sept. 1945, Appendix V), a Nauruan, reveal the extent of damage wrought by the United States' bombing of the Island. Generally this was a daily occurrence, its purpose to prevent the newly built airfield and the phosphate works from operating. In the result, no phosphate was exported from Nauru during the Japanese occupation.

106. At the end of the war in September 1945, Nauru was in a state of chaos (31st/51st Battalion, AIF, War Diaries, History of Japanese Occupations of Nauru). Very considerable damage had been done to both housing and mining installations by allied bombing. The Nauruan population of the island at that time constituted only 591 individuals. The Nauruans on Truk were repatriated to Nauru on 31 January 1946 -- a date which was thereafter of great importance to Nauruans, and which was to become the day set for independence. Approximately one third of the total Nauruan population had been lost during the war (Australian Archives, ACT, CRS A518, Item T800/1/2; and generally on the Japanese occupation see N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970, chapter 5).

Section 2. The Transition to Trusteeship

107. Albert Ellis, the discoverer of phosphate on Nauru, stated that upon the cessation of hostilities the word "shambles" was an appropriate term for Nauru. (A. Ellis, *Mid Pacific Outposts*, Brown & Stuart Limited, New Zealand, 1946, p.64.) The industrial works had been largely demolished, and little or nothing was most of the Nauruan villages. Owing to the fall in the numbers of Nauruans, the returning Australian administration did not have as large a task as it may otherwise have had in providing housing and employment. But the difficulties confronting the Nauruan community were not made easier by the acute population loss. Dr. Viviani (N. Viviani, *Nauru. Phosphate and Political Progress*, pp.89, 182) sets out the demographic situation. In 1948, the Nauruan population between 16 and 60 years was only

737 persons (405 male, 332 female). This had two significant results. Although the percentage of Nauruan males above the age of 16 employed in Nauru was always about 90%, the requirements of the phosphate industry were such that considerable numbers of foreign workers were required. The numbers of migrant labourers equalled or nearly equalled the total number of indigenous Nauruans. Phosphate mining to the present day has required the importation of considerable numbers of overseas workers. The other ramification was the sad reduction in numbers of senior Nauruans, people of experience and leadership. It was not hard, therefore, for the Administration to treat the community in a rather offhand manner.

108. In fact, disenchantment with Ridgway, the first Australian administrator appointed after the War, was widespread amongst the Nauruans. It arose fundamentally from the Administration's policy of concentrating its reconstruction efforts on works associated with the British Phosphate Commissioners. The Nauruans felt neglected, particularly in areas of housing and education. At this point, there was no secondary education available on Nauru. At the same time, Ridgway put forward a plan for distribution of royalties by virtue of a community based arrangement which cut across the customary system of individual land ownership in Nauru. (See the statement by Head Chief Hammer DeRoburt (Appendix 1 of this Memorial, para. 6) where he asserts that Ridgway was urged on in this by the British Phosphate Commissioners.) The Nauruans regarded the supervision and attitudes of Ridgway as high handed, arrogant and contemptuous. The Council of Chiefs complained first to a visiting Department of Territories Officer, then wrote to the Australian Minister for Territories, E.J. Ward, and finally sent a petition to the Trusteeship Council. All this produced a visit by the Acting Minister for Territories, Cyril Chambers, who persuaded the Chiefs to withdraw their petition. (Detudamo to Ward 1 October 1948, Australian Archives, ACT, CRS A518 Items AV 118/12, AV 118/6(3).) Ridgway's term was not renewed.

109. But controlling Nauruan dissent was not the main concern of the post-war Administration. Amongst the Partner Governments, there was some disagreement about the formulation of a Trusteeship Agreement. Provision for such agreements was included in Chapters XII and XIII of the United Nations Charter. Nauru presented its share of problems, with the continuing concern about the monopoly position of the British Phosphate Commissioners under the Nauru Island Agreement of 1919. For that reason, there was a delay in submitting a draft Trusteeship Agreement to the

General Assembly. Because of its delicacy, it was politic to await the formation of the Trusteeship Council with its "specially qualified persons", and to negotiate with that body before confronting the General Assembly. (Department of External Affairs, Canberra to Dunk, Australian Representative, London, Australian Archives, ACT, CRS A518, Item 023/2/2(1).)

110. At first, and consistently with its attitude in 1919, Australia sought to eliminate the partners and assume total control of the Administration, though without affecting the position of the British Phosphate Commissioners. New Zealand expressed fears at the consequences of this move. (UK High Commission to Dominions Office, 22 November 1945, Great Britain, Public Records Office, London, Dominions Office 35/1931, WR213/8/1.), and sought support from the United Kingdom "if Australia attempts to force the issue". (UK High Commission, Wellington to CRO, 11 July 1947, Great Britain, Public Records Office, London, Dominions Office 35/3829, U2976/2.) Faced with these objections Australia abandoned its bid for a sole trusteeship.

111. The issue of the continuance of the existing mining arrangements in the light of Article 76(d) of the United Nations Charter was a matter of some controversy between the three Governments. Article 76, besides stating the object of promoting the political, economic, social and educational advancement of the inhabitants of trust territories, also embraced the "open door" policy of the mandate system. In particular it required the administration of trust territories to be carried out in such a way as "to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals". The difficulty was expressed in the following terms in the initial briefing paper on the issue:

> 'Although the 'equal treatment' in economic and commercial matters referred to in the Charter is subject to the general obligation to promote the advancement of the inhabitants, it may be difficult to maintain successfully that the exclusive right of exploitation and distribution of phosphate in Nauru can be justified solely on the ground that it is necessary in the interest of the Nauruan natives.'

112. The British Government was acutely aware of the problem, given its varied colonial interests. The interests of Australia and New Zealand focused on the maintenance of the phosphate monopoly, which assisted them

to a much greater degree than the United Kingdom. A United Kingdom minute put it succinctly:

> "It is clear that a draft that did not pay homage to Article 76(d) of the Charter would stand little chance of being approved by the Assembly. If, therefore, it becomes clear that the Nauruan Agreement is irreconcilable with Article 76(d), the matter will resolve itself into a clear question whether or not Nauru should be placed under Trusteeship."
>
> (Minute by Costly-White, 5 November 1946, Great Britain, Public Records Office, London, Dominions Office 35/1114, G158/61.)

113. Australia responded to the situation by suggesting that the Nauru Island Agreement was covered by Article 80 of the United Nations Charter. At the time there was a disagreement between the partners as to whether this constituted an adequate rationalisation. (Discussion between British and Australian officials, 21 July 1947. For the British account see Great Britain, Public Records Office, London, Colonial Office 537/1462; for the Australian account, Australian Archives, ACT, CRS A518 Item 103/2/2(1).) A curious aspect of these discussions was the solution put forward, though not acted upon, to the effect that if the three Governments sold to all buyers, including themselves, at market price the increased cost to themselves could be met by using the vastly increased profits of the British Phosphate Commissioners to increase the subsidy to their own farmers. This proposal makes clear what was really happening, namely, that the existing cost price arrangement under the 1919 Agreement represented a subsidy to Australian and New Zealand farmers, and a denial of considerable resources to the Nauruan community.

114. As the months went by without a draft Agreement being presented to the Trusteeship Council, it was evident that both Australia and New Zealand were intent on maintaining their position. In September 1947, the view was taken by the Ministers involved that it would be better to have no trusteeship agreement at all, and presumably to operate in the South African mode of maintaining the territory under mandate, rather than have the phosphate arrangements jeopardised in any way. (Department of External Affairs, Wellington to NZ Consul-General, UN, 16 September 1947, National Archives, Wellington, EA1, 302/7/5(1B), quoted in B. Macdonald, *In Pursuit of the Sacred Trust. Trusteeship and Independence in Nauru*, New Zealand Institute of International Affairs, Occasional Paper No. 3, Wellington, 1988, p.27.)

115. The matter of the Agreement eventually came before the Fourth Committee of the General Assembly in October 1947. In fact there was no debate on the distribution of phosphate or the pricing arrangements. The issues relating to the compatibility of the Nauru Island Agreement 1919 with the Trusteeship Agreement were never directly addressed in the Fourth Committee and the General Assembly: see *General Assembly Official Records*, 2nd Session, 4th Committee, S/R, 35th Mtg, pp.25-28, 46th Mtg, pp.98-104. The comment has been made that "it was good fortune, rather than support for the legal and moral principles involved, that provided a safe passage". (Macdonald, op. cit., p.30).

116. The British Government was still not convinced that all was well. The Havana meeting on World Trade in 1948 resurrected the arguments, but resulted in a policy by the partners of "letting sleeping dogs lie". It was feared that the Trusteeship Council, with its Visiting Missions and Annual Reports, would raise the controversial questions concerning the Nauru Island Agreement. The British Government was willing to consider either the abandonment or substantial amendment of the 1919 Agreement in the event of hostile criticisms in the Trusteeship Council. Australia and New Zealand would not agree to such a course. (Cumming-Bruce, CRO, to Hildyard, Foreign Office, 1 June 1949, Public Records Office, London, Dominions Office 35/3830B, U2976/13.)

Section 3. The United Nations Visiting Missions

117. An aspect of the trusteeship system that proved most important to the Nauruan community was the opportunity of speaking to persons other than the Australian Administrator or the island Manager of the British Phosphate Commissioners -- an opportunity created by the institution of visiting missions. Throughout the Mandate period there was no independent supervision "on the ground", no manner by which the Nauruans could speak to an independent "auditor". It is true that a petition could be addressed to the Permanent Mandates Commission, but that was a distant and remedy: the Nauruans craved an opportunity to address face to face someone seemingly uninfluenced by the Administration or the British Phosphate Commissioners. The first Visiting Mission was therefore eagerly awaited. The Nauruans were concerned, in the immediate post-war period, with questions relating to employment, education, returns from phosphate, political responsibility, and also with the constant problem of the cumulative

devastation of their land. It falls to very few to witness their country being diminished in usable size on a daily basis by the very people entrusted with its protection.

118. In fact, there were six visiting missions to Nauru, in the years 1950, 1953, 1956, 1959, 1962 and 1965. (For the Reports of the Visiting Missions see Annexes, vol. 4, Annexes 7 - 12.) The introduction to the first Report of 1950 remarked that:

> "...unless further research should result in the establishment of new forms of agriculture or of secondary industries, the Nauruans may have to consider in the future the possibility of a transfer to some other island."
>
> (*Report of the UN Visiting Mission to Trust Territories of the Pacific on Nauru, 1950*, *Trusteeship Council Official Records*, Eighth Session, Supp. No. 3, T/790, p.2.)

119. The obvious political and administrative difficulties brought about by the Nauru Island Agreement 1919 were quickly grasped. In the words of the Report:

> "The British Phosphate Commissioners occupy so commanding a position in the economy of the island that their administrative independence is virtually complete, and the position of the Administrator in his relations with them appeared to the mission to be a difficult one."
>
> (loc. cit., p.3.)

120. What is notable about the six Reports is the consistency of the questions raised over the period covered. As the Nauruans gain experience and become more politically articulate, greater urgency is expressed in the questions and petitions. In general, the issues raised related to employment, education, political control, control of the phosphate industry, and the rehabilitation of mined land.

Section 4. The System of Public Finance under Trusteeship

121. The first Visiting Mission Report in 1950 gives, however, a striking illustration of the manner of financing the island by the Australian Administration which really harks back to the prophetic words of W.M. Hughes, declaring that here was a possession which could more than pay for itself. (See para. 34 above.)

122. In the section dealing with Public Finance, the Mission lists the scale of royalties on each ton of phosphate exported. It reads as follows:

'Royalties paid to or on account of the Administration

6d.	to meet the ordinary expenses of the Administration
6d.	to repay the rehabilitation advance[1]
6d.	to repay the advance for Nauruan housing
1/6d	

Royalties paid under the agreement of 23 May 1947 between the British Phosphate Commissioners and the Nauruan Council of Chiefs

6d.	to the owner of the land from which the particular ton of phosphate was exported
3d.	to the Nauru Royalty Trust Fund to be used exclusively for the benefit of the Nauruans
2d.	to be invested for the benefit of the landowners in the Nauruan Landowners Royalty Trust Fund
5d.	to be invested for the benefit of the Nauruans in the Nauruan Community Long Term Investment Fund
1/4d.'	

(*Report of the United Nations Visiting Mission to Trust Territories in the Pacific on Nauru, 1950, Trusteeship Council Official Records*, Eighth Session, Supp. No. 3 (T/790), p.3.)

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[1] This refers to the advance paid for governmental infrastructure reconstruction after war damage (see para. 107). It had nothing to do with restoration of the mined-out lands.

123. This schedule reveals a number of factors basic to the public financing of Nauru. Although the Administration derived some revenue from import duties, licence fees and a capitation tax, the amounts were minute. The cost of administration of the island by Australia was to come from the "royalty" paid to the Administration by the British Phosphate Commissioners out of the phosphate tonnage exported. Additionally, post-war costs of rehabilitation, direct war damage, roads, lighting, sewerage, construction of government buildings and other works were financed by a loan of £200,000 from the British Phosphate Commissioners, which was recouped by a royalty of 6d. per ton on phosphate exported. Similarly, the British Phosphate Commissioners provided a loan of £200,000 for Nauruan housing, destroyed during the war, which again was paid back using the same method. In both cases the loans were to be paid back to the British Phosphate Commissioners over a period of fifteen years. In other words, with every ton of phosphate exported, the Nauruan community was faced with a further piece of land incapable of restoration economically but which was paying for all the goods and services of an Administration which had undertaken to preserve the integrity of the community.

124. In relation to the royalties paid to Nauruans, which amounted to 1s.4d. in 1950, it is important to differentiate between the various payments. Six pence was paid directly to the landowner concerned, and a further two pence to a Landowners Royalty Trust Fund. Five pence was invested in the Nauruan Community Long Term Investment Fund, created in 1948, which the Nauruan community saw and still sees as an accumulating fund to meet the needs of government when the mining of phosphate ceases to provide adequately for the economic needs of the citizens of Nauru. This is provided in Article 62 of the Constitution of Nauru (Annexes, vol.4, Annex 42) which reads:

> "(1.) There shall be a Long Term Investment Fund constituted by the moneys that immediately before the commencement of this Constitution constituted a fund called the Nauruan Community Long Term Investment Fund and by such other moneys as are appropriated by law for payment into the fund or are paid into the fund as provided by clause (2.) of this Article.
>
> (2.) Moneys constituting the Long Term Investment Fund may be invested as prescribed by law and income derived from moneys so invested shall be paid into the fund.
>
> (3.) Notwithstanding the provisions of Article 59, no moneys shall be withdrawn from the Long Term Investment Fund (otherwise than for investment under

> clause (2.) of this Article) until the recovery of the phosphate deposits in Nauru has, by reason of the depletion of those deposits, ceased to provide adequately for the economic needs of the citizens of Nauru."

Threepence was paid to the Nauru Royalty Trust Fund set up for the benefit of Nauruans but which was controlled by the Administration, and which paid for Nauruan education. Rather less than 50% of the Royalties "paid to Nauruans" were paid direct to the landowner: in the subsequent fifteen years that figure was reduced to about 20%. The remainder of the moneys paid by way of Royalty "to Nauruans" were paid to funds invested and controlled by the Australian Administration.

125. What is clear from these figures is that the returns from phosphate mining formed the basis of the public financial arrangements of Nauru. (See also the Statement by Head Chief Hammer DeRoburt, Appendix 1, para 17.) There was no funding, as occurred in other Trust Territories (e.g. New Guinea), from the Administering Authority itself.

126. Royalty payments again became the subject of major negotiations between the Nauruan community and the British Phosphate Commissioners in 1959, and in 1964-1965. In particular major changes took place when at last, in 1964, the Nauruans were permitted to seek independent and expert advice, and were thus enabled to bring considerable pressure to bear on the Australian administration. (A table of royalty rates between 1920 and 1966 appears in N. Viviani, *Nauru. Phosphate and Political Progress*, Canberra, 1970, p.189.)

Section 5. Control of the Phosphate Industry

127. Previously the British Phosphate Commissioners had negotiated on royalties using a certain limited conception of the "needs" of the Nauruans But from the 1959 negotiations onwards the British Phosphate Commissioners were faced with a different kind of argument from the Nauruan negotiators -- the "rights" of the community. Not only was the Nauruan community seeking to get an equitable return, what the community described as "fair worth", from phosphate rather than a royalty built out of the "cost price" formula. It was also looking towards the day when ultimately it could control the extraction rate and sale of the phosphate in terms

suitable to the community rather than in terms of meeting the requirements of Australian and New Zealand farmers.

128. In 1959, the Nauruan representatives told the British Phosphate Commissioners that they wished to own the phosphate and mine it themselves and for their own benefit. At the same time, the British Phosphate Commissioners were increasing the annual production rate. By 1961, extensions on storage facilities had been completed and a second cantilever for the loading of phosphate was in operation. Export tonnages of phosphate rock were increased at Nauru to well over 1.5 million tons per annum.

129. When, following a Trusteeship Council recommendation (*Report of the Trusteeship Council*, 1961-62, *General Assembly Official Records*, 17th Session, Supp. No. 4 (A/5204), p.39) negotiations took place in November 1963, the British Phosphate Commissioners refused the Nauruan Local Government Council the opportunity to obtain independent economic advice on the economics of the phosphate industry. Instead, a bargaining process was begun where the British Phosphate Commissioners offered a 30% increase in royalties and the Nauruans countered with a 50% demand, the equivalent of 4 shillings per ton. This was readily accepted by the Commissioners, so readily indeed that the Nauruans decided to present a new case to test how far the Commissioners were prepared to go in order to maintain the existing system of control. Meantime, the Trusteeship Council had recommended that the British Phosphate Commissioners accept the presence of a professional adviser in later meetings with the Nauruan delegation. (*Report of the Trusteeship Council, 1963-1964, General Assembly Official Records*, Nineteenth Session, Supp.No.4 (A/5804) p.30.)

130. At this point, the Australian Department of Territories stepped in to take over the negotiating round from the British Phosphate Commissioners. The Department offered 7 shillings a ton and the Nauruans, now armed with advice, sought £1 per ton. Royalty was being paid by the British Phosphate Commissioners on Ocean Island (Banaba) at the rate of 25s.8d. After further haggling the Nauruans reduced their demand to 14s.8d which represented, taking account of the administration costs on Nauru (estimated at the rate of 11 shillings) the equivalent of the Banaban royalty. But, significantly, the Nauruans reserved their position that royalties should be paid at the full difference between the costs of production at Nauru, including normal profit, and the world price for phosphate -- in other words,

the economic rent. There was a ready reckoner on world price, namely, the price of Makatea (French Polynesia) phosphate (see the Report by Mr. K.E Walker, Appendix 2.) The Nauruans believed that they should not be called upon to subsidise Australian and New Zealand farm production, and lose for themselves the economic rent as their usable land got less and less.

131. The Australian Department of Territories rejected this whole argument, which went to the very basis of the control exercised by Australia since 1919. It was now clear that future discussions were not going to be confined to royalty rates on the old formula of "needs". The talks, in 1965 and 1967, conducted by the Administering Authority and the Nauruan delegation, now armed with economic advisers, considered royalty increases, but were strongly directed to the means of exercising control of the phosphate industry. Eventually new royalty rates were agreed for 1965 at 13s.6d per ton and for 1966, 17s.6d per ton. (Viviani, op. cit., p.189.)

132. The phosphate talks between 1964 and 1967 saw the Nauruan delegation, at first, being offered by the Partner Governments a concession by way of a 50% interest in the industry. (Nauru Talks 1966, 1st Session, Annex 4, p.12: Annexes, vol. 3, Annex 4.) The Nauruans, however, proposed that the British Phosphate Commissioners should simply mine the phosphate on behalf of the Nauruans as managing agents, with the sale being made at the world price (loc. cit.). No agreement was reached and the matter was adjourned to 1967.

133. The 1967 talks between the Partner Governments and the Nauru Local Government Council were concerned largely with how control was to be effected. With increasing production by the British Phosphate Commissioners, the Nauruans wanted control as soon as possible. On the other hand, although facing pressure from the Trusteeship Council, the Administering Authority was concerned that any future control should not affect the security of supply.

134. At the commencement of the 1967 talks, the Nauru Local Government Council made submissions (See Annexes, vol. 3, Annex 5) to the Joint Delegation of the Partner Governments, chaired by Mr Warwick Smith, Secretary of the Australian Department of Territories. The Council accepted the importance of phosphate to the Partner Governments and their need for continuity of supply and at an agreed price. But it also emphasised the long term needs of the Nauruan people. For that reason, the Council

suggested that the Partner Governments' interests in the phosphate be limited to the two matters, supply and price, and that all other matters should be the exclusive concern of the Nauruan people The earlier offer to the British Phosphate Commissioners of management with a management fee was withdrawn.

135. For their part, the Joint Delegation tried to forestall ultimate control of the industry by submitting various proposals, all involving management through the British Phosphate Commissioners. The proposals of the Joint Delegation were based on British Phosphate Commissioners' control together with a shared residual return between Nauru and the Partner Governments, starting at 50/50, then 75/25, and finally 87.5/12.5 in favour of the Nauruans.

136. At the conclusion of the 1967 talks, it was agreed that a Nauru Phosphate Corporation would be established, and that the British Phosphate Commissioners would be bought out by the Nauru Local Government Council, the predecessor of the Nauru Government. The price to be paid was to be based on the depreciated value of the Nauru island capital assets of the British Phosphate Commissioners: it was subsequently agreed at A$21,000,000. This was to be paid over a period of three years, with an interest rate of 6% operating on moneys unpaid after 1 July 1967. The management was to remain in the hands of the British Phosphate Commissioners for three years from 1 July 1967 or until the final payment was made by the Nauruan Government to the British Phosphate Commissioners. These arrangements were contained in an Agreement relating to the Nauru Island Phosphate Industry (see Annexes, vol. 3, Annex 6). The Agreement was eventually concluded on 14 November 1967, but by paragraph 22 of the Agreement was deemed to have come into force on 1 July 1967.

137. So far as the Partner Governments were concerned, they achieved in the Agreement continuity of supply and an agreed formula on price. Paragraph 5 of the Agreement reads as follows:

> "(1.) Phosphate from the deposits on the Island of Nauru shall be supplied exclusively to the Partner Governments.
>
> (2.) The phosphate shall be supplied at the rate of two million tons per annum or as near thereto as may be practicable, and the Partner Governments will provide an assured market in such manner as they may

> designate, at the price ascertained from time to time in accordance with the provisions of this agreement."

Paragraph 24 of the Agreement made provision for a review of Part II, the provisions dealing with the supply of phosphate. That review was carried out, after Nauruan independence, in 1969 between representatives of the former Partner Governments and a delegation from the Nauru Government. At the conclusion of the review, an Agreed Minute was drafted, which was to be read and construed as part of the Agreement relating to the Nauru Phosphate Industry 1967 (see Annexes, vol. 3, Annex 6). *Inter alia*, it guaranteed to the Nauruans a market for phosphate to a certain tonnage in the countries of the former Partner Governments. Although Nauru was no longer restricted to supplying the former Partner Governments exclusively, it had to assure tonnages and give to these Governments priority of supply.

138. Throughout these negotiations, the question of rehabilitation was treated as a separate and distinct issue. A passage in the course of the 1967 talks makes this position clear:

> "26. The Secretary asked would the Nauruans press their argument despite any financial arrangements made, that the Partner Governments had a responsibility on rehabilitation.
>
> 27. During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim, in a formal manner such as in an agreement."
>
> (Nauru Talks 1967, p. 51.)

The issue of rehabilitation remained unresolved, as was noted by the Nauruans' leader, Hammer DeRoburt, on the eve of independence in his speech to the Trusteeship Council. (See para. 192.)

Section 6. Political Developments

139. There were few if any changes of importance in the degree of political control exercised by the Nauruan community during the Mandate. But in its first debate on Nauru, the Trusteeship Council indicated some disquiet at the existing position and sought a greater degree of self-government. It even

went so far as to suggest that the need for advancement of Nauruans must take precedence over the expansion of the phosphate industry (United Nations, *Report of the Trusteeship Council 1948-49, General Assembly Official Records*, Supplement No.4 (A/933) p.76).

140. In 1949, the Administering Authority reported that the Council of Chiefs was constituted and acted in the same manner as it had since 1928. Only one Nauruan had a position of any importance in the Administration, as Native Affairs Officer. The lack of political advancement moved the Trusteeship Council to the following comments:

> "(6) The Council, noting that although the inhabitants are prepared to take a larger measure of participation in government than at present enjoyed, political development has so far been slow, and noting in particular that all key positions in the administration are held by Europeans and that the Nauruans have not been given the necessary training to occupy such positions and that the inhabitants have little or no voice in the administrative or financial policies, recommends therefore that the Administering Authority take legislative and other measures to afford the inhabitants a larger degree of self-government through participation in the legislative, executive and judicial processes and organs of the Territory, and that such measures include the reconstitution of the Council of Chiefs as a fully representative body elected on a democratic basis with progressively increasing legislative, administrative and budgetary powers, including powers in respect of the control of all royalty funds and negotiations, and recommends further that the Administering Authority provide wider facilities for the training of Nauruans in administrative positions as well as opportunities for experience in public office.
>
> (7) The Council recommends that the Administering Authority enact an organic law setting forth the fundamental rights and duties of the inhabitants and defining the nature and functions of the various organs of government including the principle of the separation of the judiciary from the executive.
>
> (*Trusteeship Council Official Records, Fifth Session, Examination of Annual Reports: Nauru, Year Ended 30 June 1948* (T/381) pp.11-12.)

141. The Council of Chiefs itself was aware of the lack of advancement, and exercised its right to petition the Trusteeship Council. The matter was reported in the 1948-1949 Report of the Trusteeship Council to the General Assembly:

> "8. Petitions concerning Nauru
>
> The Council, at its fourth session, had before it a petition from the Nauruan Council of Chiefs stating that, despite the high degree of literacy which the population of Nauru had achieved in the last twenty-five years, the Native inhabitants still had no voice in the formulation of general administrative policies or in the control of the finances of the island. The petitioners requested that a representative of the United Nations should be sent to Nauru to inquire fully into the whole matter. At the 12th meeting, the Council decided to postpone further consideration of this petition until the fifth session.
>
> The written observations of the Australian Government on the petition were received at a later date. Subsequently, a further communication was received from the Nauruan Council of Chiefs, withdrawing the petition as a result of assurances given to them by the Australian Acting Minister of External Territories during a visit to the Trust Territory."
>
> (*Report of the Trusteeship Council covering its Fourth and Fifth Sessions 1948-1949*, General Assembly Official Records, Fourth Session, Supp. No. 4 (A/933) pp.93-94.)

142. The Australian Government had hastily dispatched the Acting Minister for Territories to Nauru (see above para. 108), and the petition had been withdrawn. In answering observations by members of the Trusteeship Council, the representative of the Administering Authority gave the following explanation:

> "...the indigenous inhabitants had been praised as material for a model island community. They were, however, a very much less standardised or developed people than the Polynesians, and with rare exceptions, they were hardly to be compared with them in natural gifts. They were not unintelligent people, and they were a happy people. But they were also a very indolent people, not unexpectedly, because of their nearness to the equator. The representative also stated that, although it was thirty years now since Nauru first became a matter of international interest, of those thirty years only four of them had the benefit of contact with the Trusteeship Council, and another four had been years of war and complete physical devastation -- years, too, of inhumane treatment by the enemy of the indigenous inhabitants of Nauru. Twenty-five per cent of the Nauruans had lost their lives. That 25 per cent were the flower and youth of the island. Those who were left were the old men, by Nauruan standards, and generally tired

> old men, or, on the other hand, the very young, still not ripe for taking part in councils. The first task had been one of rehabilitation was not yet entirely complete, but it was becoming possible to give more concentration to the goal of development."
>
> (*Report of the Trusteeship Council 1949-1950, General Assembly Official Records*, Fifth Session, Supp. No. 4 (A/1306) pp.140, 141.)

143. Following the Visiting Mission in 1950, the Administering Authority informed the Trusteeship Council that, with the consent of the Nauruans, the Council of Chiefs was to be reconstituted as an elected body with some additional powers. As a result the Nauru Local Government Council Ordinance 1951 (Nau) was enacted. Apart from becoming an elected body with a statutory base, the Council of Chiefs was not substantially changed. Like the former Council of Chiefs, the new Council's task was simply to advise the Administrator on matters affecting the Nauruan community. The Administrator could act in opposition to the advice of the Council on any matter.

144. Throughout the 1950s, the Trusteeship Council gently chided the Administration about the lack of executive power in the Local Government Council and the failure to employ Nauruans in the higher echelons of the Administration. For example in 1959 it made the following recommendation:

> "The Council, endorsing the views expressed by the 1959 Visiting Mission that the Administering Authority should not be too reluctant to take a certain amount of risk in carrying out its declared policy and the objectives of the Trusteeship Agreement and that the time is imminent when local matters can, for the most part, be entrusted to the Nauruans, welcomes the statement of the Administering Authority that careful consideration will be given to these views by it when reviewing the powers and functions of the Nauru Local Government Council in local matters.
>
> On the other hand, the Council trusts that the Local Government Council will exercise to the full the powers it already has and that the Administering Authority will further foster such an exercise.
>
> The Council recommends that the Administering Authority consider, in accordance with Article 76b of the Charter, the adoption of further measures necessary to promote the political advancement of the Nauruans."
>
> (*Report of the Trusteeship Council 1958-1959, General Assembly Official Records*, Fourteenth Session, Supp. No.4 (A/4100) p.157.)

145. The decade ended, so far as advancement of Nauruans is concerned, more or less as it had begun. But the Nauruans were seeking additional executive powers and participation in proceedings concerning Nauru at the Trusteeship Council. The Trusteeship Council hoped that at its next examination of conditions in Nauru, a Nauruan leader or leaders would be included in the Australian delegation. (*Report of the Trusteeship Council 1959-1960, General Assembly Official Records*, Fifteenth Session, Supp. No.4 (A/4404) p.153.)

146. Similarly the 1962 Visiting Mission made its view clear that there was too small a participation by Nauruans in the legislative and executive control of the Island. (*Visiting Mission Report on Nauru 1962*, Trusteeship Council Official Records, Twenty-Ninth Session, Supp. No.2, p.10; Annexes, vol.4, Annex 11.) The Visiting Mission endorsed the concerns of the Nauruan leaders as to the continued paternalism of the Administration. A Memorandum submitted by the Nauru Local Government Council to the Visiting Mission in 1962 stated:

> 'The Administering Authority, like a too fond parent, appears to be obsessed with a fear lest we break our neck once his hands are off our shoulders as it were. So we have to wait till we attain that human perfection in everything, before we are given a chance to find our own feet. We believe that risks are part and parcel of human development.
>
> Looking enviously around and beyond us, we see other islands and peoples, some just emerging from their old life while others are being prepared, with realistic target dates fixed for progressive advancement towards independence. We are not even favoured with tentative target dates. On the other hand, we are being loaded with intangible promises which seem to accumulate stratum after stratum as the years roll by. Promises, plans and projects which through their own accumulated weights have become static and in places stagnant for want of motion.
>
> It is our earnest hope that the Visiting Mission will persuade the Administering Authority to be a bit more daring to take a risk with us, and if it is not prepared, we will most reluctantly be persuaded to look around and request another Administering Authority, who will be willing to take more risk with us, to guide and lead us to our ultimate goal through the usual and perhaps the only way -- trial-and-error method.
>
> The argument against us that we have not yet made full use of the existing extensive power of the Council is not quite realistic. If the circumstances are looked into carefully, it will be noticed that one's enthusiasm and initiative are

> inevitably muffled and blunted by too much, and most of the time unnecessary restrictions, or, in other words, we are being too much and unnecessarily hedged in."
>
> (United Nations, Visiting Mission, *Report on Nauru 1962, Trusteeship Council Official Records*, Twenty-Ninth Session, Supp. No.2 (T/1603) Annex II p.24; Annexes, vol. 4, Annex 11.)

147. At the Trusteeship Council, the Visiting Mission Report was considered and the following recommendation was adopted:

> "The Council bearing in mind the importance of assisting the Nauruan people to be self-governing in all their domestic affairs, endorses the view of the Visiting Mission on this matter and recommends that an advisory committee should be set up immediately to consider the whole matter of future legislative and executive authority and to work out constitutional plans for full Nauruan participation in the legislative and executive administration of the Territory.
>
> The Council welcomes the statement of the special representative that he does not see any disagreement with the principle of fuller participation by the Nauruans in their own government as suggested by the Visiting Mission, regardless of whatever developments the future may bring in relation to the future home."
>
> (*Report of the Trusteeship Council 1961-62, General Assembly, Official Records*, Seventeenth Session, Supp. No.4 (A/5204), p.37.)

148. This heralded some changes. The Administration amended the Nauru Local Government Council Ordinance in 1963. The effect of the amendment was to reduce the power of the Administrator to reject advice from the Council or, in relation to the general powers of the Council, to allow the Council to act without requiring the approval of the Administrator. Whilst it represented a certain movement in the right direction, this was not demonstrably what the Trusteeship Council had hoped for. The Trusteeship Council pressed the matter, adopting the following recommendation:

> "The Council notes that the Nauru Local Government Council Ordinance was amended by an Ordinance which came into operation on 4 October 1963 and widened the powers of the Council. Recalling its recommendation adopted at the thirtieth session and conclusions reached by the United Nations Visiting Mission 1962, the Council considers that before the next vital stage of constitutional advance is undertaken, there should be a full consultation with the elected leaders of the people and to that end an Advisory Committee should be set up as quickly as possible to consider the whole matter of future legislative

> and executive authority of Nauru. The Council endorses once more the views of the Visiting Mission which suggested that the Advisory Committee might be composed of all members of the present Nauru Local Government Council sitting with the Administrator and a representative of the Department of Territories, together with a legal officer experienced in constitutional matters. The Advisory Committee's task would be to work out and put forward for consideration constitutional plans for full Nauruan participation in the legislative and executive administration of Nauru. The Council hopes that the Administering Authority will take the necessary steps in this direction and will make a report to the Trusteeship Council at its next session."
>
> (*Report of the Trusteeship Council 1963-64, General Assembly Official Records*, 19th Session, Supp. No.4 (A/5804), p.27.)

149. The 1965 Visiting Mission came to the conclusion that the Nauruan leaders were now capable of conducting their own internal affairs and recommended that a Legislative Council be set up in accordance with the expressed wishes of the representatives of the Nauruan people.

> "The establishment of this Legislative Council would be a step in the direction of self-determination which the Nauruan people have the right to exercise freely."
>
> (*Report of the Trusteeship Council 1964-1965, General Assembly, Official Records*, 20th Session, Supp. No. 4 (A/6004), p.44; Annexes, vol.4, Annex 12.)

150. The pressure applied first through the Visiting Mission and then by the Trusteeship Council, at the behest of the Nauruans, resulted in the first major legislative change in Nauru since 1919. For the first time, and only two years short of independence, Nauru was provided with something approaching a constitutional instrument, adopted after discussions with the Nauru Local Government Council, and after agreement had been reached between the three Governments. The legislation was the Nauru Act 1965 (Cth) (see Annexes, vol. 4, Annex 39). Under Article 7 of the tripartite Nauru Agreement of 1965, Article 1 of the 1919 Agreement, and the 1923 Supplementary Agreement ceased to have effect (see Annexes, vol. 4, Annex 30).

151. The Nauru Act 1965 (Cth) established a Legislative Council consisting of the Administrator, five official members appointed by the Governor-General of Australia and nine elected members. The Administrator presided at meetings of the Council. The Legislative Council had the general power to make Ordinances for the peace, order and good government of the

Territory, subject to a withholding and reserving power in the Administrator. But this general power was heavily circumscribed by exceptions -- defence, foreign affairs, and, importantly in the context of Nauru, the phosphate industry (including the operation, ownership and control of that industry, phosphate royalties and the ownership and control of phosphate-bearing land). The 1919 Agreement, apart from Article 1, continued to operate and was not subject, in any way, to the powers of the Council. This meant that, apart from striving for independent political control, the Nauruan community had a separate and distinct goal in seeking participation in the phosphate industry. The 1965 Act, however, was a step in the political developments which culminated in the Constitutional Convention of 1967-68. The separate control of the phosphate industry, on the other hand, developed from a series of discussions of the mid-'60s, some hard bargaining, and the eventual purchase of certain physical assets. (See above paras. 127-138.)

152. The remainder of the political development leading to independence can be reported shortly. The establishment of the Legislative Council provided a vehicle for moving towards independence. At the resumed first meeting of the Legislative Council, which had started to meet in May 1966, Councillor Hammer DeRoburt moved for the appointment of a Select Committee to inquire into and report upon the most suitable means by which the people of Nauru could achieve complete independence by January 1968. The motion was passed. (*Report of the Trusteeship Council 1965-1966, General Assembly Official Records*, 21st Session, Supp. No.4 (A/6304), p.36.)

153. The Administering Authority also reported to the Trusteeship Council at its 33rd Session that discussions were proceeding between a delegation of the three Governments and a delegation representing the Nauruan people on future arrangements for the phosphate industry, and on the separate subject of the Report of the Davey Committee on rehabilitation of the worked-out lands (see below paras. 178-184.)

154. At this stage, it was clear what the Nauruan people had decided. The Report of the Trusteeship Council states:

> "At its thirty-third session, Councillor Hammer DeRoburt, member of the Australian delegation and elected Head Chief of the Nauruan people, informed the Trusteeship Council that there was a very strong and earnest desire on the part of the Nauruan people to remain the people of a distinct small nation, which in a sense they were. No matter how small they were and how unimportant they may be to others, they wanted to be free to perpetuate their homogeneity and to

> preserve themselves as a distinct people and nation. They wanted to shape their own destiny. They were firmly convinced that these desires and aspirations could be achieved only if they were granted sovereign independence. They wanted to achieve independence by 31 January 1968. Any delaying of independence would not be acceptable to them. Their considered judgement was that it would be better for the Nauruans to have independence sooner than later. The integration or assimilation into a bigger country would mean the complete disintegration and extinction of the Nauruans as a people."
>
> (*Report of the Trusteeship Council 1965-1966, General Assembly Official Records*, 21st Session, Supp. No. 4 (A/6304), p.36.)

155. This constituted nothing other than a determined choice in favour of independence. With the waning support of New Zealand for the Australian position (B. Macdonald, *In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Paper No. 3, 1988, p.55), the Nauruan leadership was able to move directly to the target date for independence of 31 January 1968. But some idea of the sense of urgency can be got from the fact that the acceptance by Australia of that target date was not announced until 15 October 1967, which meant that a special session of the Trusteeship Council had to be called in November 1967 to approve Nauruan independence on that day -- a day which coincided with the important anniversary of the return from Truk of the forcibly deported Nauruans in World War II (see para. 106).

156. To make provision for the constitutional transfer, the Australian Parliament passed the Nauru Independence Act 1967 (Cth) (see Annexes, vol. 4, Annex 40), which was assented to on 10 November 1967. It repealed the Nauru Act 1965 (Cth), and provided that, after Nauru Independence Day, Australia was not to exercise any powers of legislation, administration or jurisdiction in and for Nauru. The Act also authorised the Nauru Legislative Council to establish a Constitutional Convention.

157. The Constitutional Convention met in January 1968 and drafted a Constitution suitable for a change-over on 31 January 1968. The task of the Convention was not fully completed, but the deadline had to be met. The process was described by Professor J.W. Davidson, Adviser to the Constitutional Convention, in these terms:

> "Australia had not permitted a gradual transfer of responsibility in earlier years, and as a consequence of the hasty preparations for independence that had been

> unavoidable in the final months, a great deal still had to be done. The members of the Council of State had to gain experience in the exercise of executive power and, not least, to learn the procedures essential to effective government. The Legislative Assembly had to face a heavy load of work, amending and replacing existing law. The administrative structure of government had to be reorganized. And, ultimately of over-riding importance, plans had to be worked out for the smooth transfer of the phosphate industry to Nauruan control."
>
> (J.W. Davidson, " The Republic of Nauru", *Journal of Pacific History*, vol.III, 1968, p.150.)

158. The Constitutional Convention met again between 25 April and 17 May 1968 when a number of revisions were made to the Constitution, one of which was the inclusion of section 83(2), limiting the responsibility for rehabilitation of the Government of Nauru to the area mined after 1 July 1967:

> "(2) Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the first day of July, One thousand nine hundred and sixty-seven."
>
> (See Annexes, vol. 4, Annex 42.)

Section 7. The Resettlement Issue

159. For a considerable time before independence, the Nauruan community had pressed the view that the mined land should be restored to usability. On the other hand the view of the Australian Administration and the British Phosphate Commissioners was that this was an impractical and uneconomic venture, and that the only solution was to resettle the community elsewhere -- as was done with the Banabans of Ocean Island. This has been a major source of contention since 1945.

160. The Nauruan community has always had a strong attachment to its nationhood, and to the preservation of the Nauruan identity. It was not attracted to a resolution of the problem of destruction of the land which would upset such an identity. But if, as was repeatedly told to the Nauruans by the Respondent State, the phosphate lands could not be rehabilitated, there might be no alternative to a measure of resettlement.

161. Each Visiting Mission to Nauru commented on the issue: the Reports of those Visiting Missions are set out in Annexes, vol. 4, Annexes 7 - 12

162. In particular a useful summary of the earlier consideration of this issue is set out in the 1962 Visiting Mission Report:

> "56. The question of the future of the Nauruan community was considered by the first Visiting Mission to Nauru in 1950, although no local discussions were held at that time concerning that problem. The 1950 Mission drew attention to the situation in the neighbouring Ocean Island whose phosphate deposits were to be exhausted -- and whose people had already been resettled on Rabi Island in the Fiji group -- and expressed the view that resettlement of the Nauruans on some other island or territory might offer the only satisfactory long-term solutions unless research some possible alternative of livelihood for the people.
>
> 57. When the question was raised with the Nauru Local Government Council by the 1953 Visiting Mission, estimates then were that the phosphate deposits would be exhausted in about seventy years. The Nauruans were already beginning to be concerned about their future, and their spokesmen indicated that outside assistance would be welcomed. The 1953 Visiting Mission believed that the question of the transfer of the Nauruans, either individually or collectively, to another place or places should not be put in abeyance until the termination of the phosphate industry, but that a plan for gradual resettlement, which might provide for the purchase of land at an early date, should be agreed as soon as possible. The Mission considered that increasing attention should be given to providing the younger generation of Nauruans with vocational training which would fit them to obtain employment in other areas of the Pacific.
>
> 58. At its twelfth session, the Trusteeship Council recommended that the Administering Authority should formulate plans, in consultation with the Nauruan people, for resettlement and should also give consideration to ways and means of livelihood for those Nauruans who might wish to remain in the Territory.
>
> 59. In 1955, the Administering Authority reported that extensive investigations as to the suitability of certain islands adjacent to Papua and New Guinea as a home for the Nauruan people had proved unsuccessful, but the Administration of the Territory had been asked to make every endeavour to find new unpopulated areas where the Nauruans could be settled without difficulty -- areas which would be suitable for agriculture, would enable the Nauruans to engage in fishing pursuits and would permit easy access to avenues of employment. Furthermore, the Trusteeship Council suggested that the Administering

Authority might give further consideration to the possibility or rehabilitating the worked-out phosphate lands.

60. In 1956, the estimated life of the phosphate deposits was reduced to approximately forty years as a result of increased production by the Company. The Administering Authority stated that officers of the Commonwealth Scientific and Industrial Research Organization had carried out a soil survey of Nauru in 1954 and had expressed the view that the rehabilitation of worked-out phosphate lands was impracticable. A passage of its report read:

> 'It would be possible to level this worked-out land with the aid of explosives and heavy crushing equipment, and it would be possible to import soil, e.g. as backloading from the mainland, but there is no certainty that the soil would stay on the surface and not be washed down into the crushed coral. Even if the plateau were to be resurfaced and maintained in this manner, there would still be the question of an adequate water supply to supplement rainfall. It is believed that any such scheme would be fraught with so much uncertainty as to final success, and would be so expensive, that it may be ruled out at once as a practical proposition for the wide-scale utilization of these lands.'

61. The 1956 Visiting Mission discussed the question of the future of the Nauruan people with the Nauru Local Government Council, which stated that there was a growing tendency among the people to favour resettlement in Australia rather than on an island off New Guinea. The Local Government Council considered that the Administering Authority should eventually meet (a) the cost of the new homeland itself; (b) the cost of erection of villages, administration centres and public institutions; (c) the cost of communication systems and other necessary and reasonable facilities. The Local Government Council was opposed to individual, gradual or piecemeal resettlement. The 1956 Mission was of the opinion that an advanced plan should be agreed upon as early as possible and that it must have the fullest support and co-operation of the Nauruan people themselves. (It recommended the formation of a standing joint consultative body consisting of representatives of the Administration and the Nauruan people with possible assistance from the British Phosphate Commissioners to provide continuous consultations on the problem.) The Administering Authority, on the other hand, pointed out that the basic difficulty lay in the fact that a physical area which would have resources to sustain the present level of living of the Nauruans and at the same time would fulfil their aspirations was not available, and that it would not be possible for Nauruans to preserve their identity in Australia. The Administering Authority further

> stated that whatever funds would be needed for the possible resettlement of the Nauruans would be forthcoming as and when required, and that all the necessary assistance, whether it be special training or technical assistance, would be amply provided.
>
> 62. The Administering Authority reported that examination of the possibilities for resettlement in the Pacific area had included islands in the Fiji group, the Solomon Islands and the Australian metropolitan area. The opinion of the 1959 Visiting Mission was that in the event that an island suitable in all respects for the resettlement of the Nauruan community could not be found, earnest consideration should be given to settlement in the metropolitan country of one of the three Administering Authorities or in a possession of any one of them where the standard of living was comparable to that enjoyed by the Nauruans.
>
> 63. On 12 October 1960 the Australian Government made proposals to resettle the Nauruans in Australia by stages extending over thirty years or more. The proposals were not accepted by the Nauru Local Government Council. The Nauru Local Government Council's alternative proposal in December 1960 for resettlement of the Nauruans in a self-governing island off the coast of Australia was explained by one of its members, Mr Gadabu, at the twenty-seventh session of the Trusteeship Council.
>
> 64. The Mission was informed that in February 1962 a delegation of the Nauru Local Government Council had paid an inspection visit to two islands off the Australian coast, namely Fraser Island on the east coast of Queensland and Prince of Wales Island in the Torres Straits. The delegation later held talks with the Minister of State for Territories in Canberra, following which a statement was issued reiterating the Nauruan leaders' belief that their best hope for a future home lay in the development of some island adjacent to the Australian coast, although neither of the two islands already inspected by the Nauruan delegation had been found suitable for that purpose.

(United Nations Visiting Mission to Trust Territories of Nauru and New Guinea 1962, *Report on Nauru, Trusteeship Council Official Records*, 29th Session, Supp. No. 2 (T/1603) pp.6, 7.)

163. The Mission went on to discuss the current position:

> "65. The first conclusion to be drawn from this record of early discussions is that the settlement of the Nauruan people in a new home is unavoidable. It is true that some suggestions have been made in the past that it might be possible to rehabilitate the land of the island for agricultural purposes by bringing soil from elsewhere and covering the coral. This suggestion

> has however, been rejected after investigation on the spot by the Commonwealth Scientific and Industrial Research Organization. And indeed no one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it except at prohibitive expense. Even a layman can see that, and it is to be noted that the suggestion for rehabilitation of the land has never come from anyone who has visited the island. It is also beyond question that the Islanders could not survive on the meagre agricultural produce of the island.
>
> On the grounds of finance alone it will clearly be impossible for them to remain in the island once the present sources of phosphate revenue are no longer available (the cost of administration including public services is now approximately $A500,000 a year or about $A100 per head per year).
>
> 66. It is true that a number of Nauruans may wish to remain in the island as long as it continues to be habitable, but the starting point in a review of this problem must be that Nauru will be incapable of maintaining the population when the phosphate is exhausted -- and present estimates indicate that this will come in less than thirty years from now."

164. The last two paragraphs above are now outdated, in view of later inquiries which establish the possibility of cost-effective rehabilitation (see paras. 178-184, 199, 205-210). But they certainly pointed to the urgency of the problem, as the day was fast approaching when the Island would be mined out.

165. Between the Report of the Visiting Mission in 1962 and the next Visiting Mission in 1965, the final act in the resettlement phase was played out.

166. Australia had not always favoured resettlement. There was some suggestion contained in a minute of the Secretary of the Department of Territories that the General Manager of the British Phosphate Commissioners was pushing resettlement simply to get the Nauruans out of the way (C.R. Lambert 4/6/53, Australian Archives, ACT, CRS A518 Item DR 118/6 Pt 1). The previous Secretary, J.R. Halligan, had suggested the island of Laucala in the Fiji Islands. (The Banabans of Ocean Island had already been relocated to one of the Fijian islands, Rabi.) Halligan felt it was necessary to find a place within Australian jurisdiction, but he suggested that "it would not be impossible for Fiji to be transferred to Australian control within a not unduly lengthy period. If that were to happen it could well be that Laucala would be under Australian jurisdiction before the

complete transfer of the Nauruans from Nauru could be effected". (Halligan 17/11/52, Australian Archives, ACT, CRS A518 Item DR 118/6 Pt 1.)

167. Soon after writing this minute J.R. Halligan became the Australian Commissioner of the British Phosphate Commissioners. The Australian position at this time fluctuated between gradual assimilation of the Nauruans in Australian Territories "after the European manner", that is, by supported individual emigration, to possible resettlement on islands off New Guinea. (See Australian Archives, ACT, CRS A518 Item DR 118/6 Pt 1, Lambert 5/11/53, and views of the Minister, P. Hasluck attached; and W.R. Marsh, Assistant Secretary (soon to become Director of Nauruan Resettlement in the Australian Department of Territories), Australian Archives, ACT, CRS A518, Item DR 118/6 Pt 1; Annexes, vol. 4, Annex 62.)

168. When the 1960 assimilation proposal was not accepted, Australia made an attempt to find suitable islands which would meet the criteria put forward by the Nauruans (*Trusteeship Council Official Records*, 31st Session, 1964, "Opening Statement on the Trust Territory of Nauru by the Special Representative, W.R. Marsh, Director of Nauruan Resettlement", T/SR.1225-1243, pp.56-59). After investigation, the Nauruans indicated that Curtis or Fraser islands should be looked at. These were both islands close to the Australian coast, part of the Australian State of Queensland. The Nauruans were not seeking full sovereign independence on Curtis Island but sufficient control to enable them to preserve and maintain their separate identity. The Nauruans also offered Australia a treaty of friendship (see statement of Head Chief, Hammer DeRoburt, Appendix 1 below, para 21).

169. At the meeting of the Trusteeship Council in May/June 1963, the Australian Government, through its Special Representative, informed the Council that:

> "If an area was chosen which was now Australian territory and which could be made available, the basis of the administrative arrangements would be that, subject to the resettled Nauruans accepting the privileges and responsibilities of Australian citizenship, they should be enabled to manage their own local administration and to make domestic laws or regulations applicable to their own community."
>
> (*Trusteeship Council Official Records*, 13th Session, 1963, T/SR.1203-1224, p.6.)

170. On 12 December 1963, the Australian representative made the following statement in the Fourth Committee on the Report of the Trusteeship Council:

> "Following advice from the Nauruan Resettlement Committee that subject to satisfactory political arrangements either Curtis Island or Fraser Island (on the Queensland coast of Australia) would be satisfactory places for the resettlement of the Nauruan people, the Australian Government decided that Curtis Island offered the better prospects for successful resettlement and formulated lines along which it would be prepared to make Curtis Island available for the purpose.
>
> These suggestions were presented by the Director of Nauruan Resettlement, with the aid of colour film and photographs of Curtis Island, to the Nauru Local Government Council and the people of Nauru during a visit from the 17th August to 12th September, 1963. During his visit the Director attended several meetings of the Council and addressed several public meetings, which took the form of open question sessions, and also made himself freely available for individual inquiries.
>
> The Nauruan Council has since informed the Australian Government that it is unable to accept the proposals on the grounds that they do not meet the wishes of the Nauruan people in respect of the form of government they want to have if resettled on Curtis Island; and that the Council will submit counter proposals for consideration by the Australian Government.
>
> The present position is therefore that, since the Trusteeship Council meeting in May/June, 1963, the Australian Government has satisfied itself that Curtis Island would offer prospects of successful resettlement; has put before the Nauruans the lines on which it would be prepared to negotiate a resettlement agreement based on Curtis Island; and is now awaiting counter proposals from the Nauru Local Government Council.
>
> The Australian government believes that its latest proposals represent a genuine and generous attempt to meet the wishes of the Nauruan people but it is prepared to give careful consideration to whatever further proposals the Nauru Local Government Council may place before it. the Australian Government will not, however, be able to depart from its decision as already stated before the Trusteeship Council 'that it cannot see its way clear to transferring sovereignty of territory which is at present part of Australia'.
>
> This matter to which the Trusteeship Council rightly attaches such importance is therefore being very actively pressed ahead and my government will continue to report in detail to the United Nations on progress as it develops."
>
> (*General Assembly Official Records*, 18th Session, 4th Committee, 1513th Meeting, 12 December 1963, A/C.4/SR.1513, p.565, para.4.)

171. Without the ability to maintain its identity as a distinct community, the Nauruan community would have been assimilated without trace into the Australian landscape. The granting of local government powers only and without recognition of a Nauruan identity was unsatisfactory to the Nauruans, and negatived their right to self-determination. The answer of the Nauruans is succinctly put in the talks with Australia in July-August 1964:

> "Your terms insisted on our becoming Australians with all that citizenship entails, whereas we wish to remain as a Nauruan people in the fullest sense of the term even if we were resettled on Curtis Island. To owe allegiance to ourselves does not mean that we are coming to your shores to do you harm or become the means whereby harm will be done to you through us. We have tried to assure you of this from the beginning. Your reply has been to the effect that we cannot give such an assurance as future Nauruan leaders and people may not think the same as we do. We have then thought up ways and means whereby the future may be safeguarded as perfectly as possible to our mutual interest but, frankly speaking, we have made all the concessions and you have made none."
>
> (Nauru Talks 1964, pp.1-2, Annexes, vol. 3, Annex 1.)

172. The Nauruan community proposed a treaty of friendship to be negotiated with Australia, and the grant to Australia powers of quarantine, defence and external affairs. Australia objected to the Nauruans having control of commercial aviation. There were also exploitable mineral sands on Curtis Island, which had already been sold to a private firm: Australia suggested that the Nauruans negotiate a partnership, and make sure that the private firm restore the surface. The Nauruans found this prospect unattractive, given that this was a situation with which they were familiar already. (Nauru Talks 1964, p.3; Annexes, vol. 3, Annex 1.) The Nauruans had also been the subject of some marked racial hostility in Queensland over the possibility of their settling in Curtis Island (Nauru Talks 1964, p.4).

173. The Nauruan delegation to the 1964 Talks summed the matter up in these terms:

> "We feel that the Australian people have an image of Nauruans which is quite wrong, but which the Government has made little effort to correct. Australians seem to have a picture of an absurdly small people who want too much from Australia, who want complete sovereign independence, and who are not as grateful as they should be for what Australia is generously offering them.
>
> We feel that most Australians think that the predicament facing the Nauruan people today which has given rise to the need for their resettlement elsewhere is

> due to natural over population and would-be sophistication of the younger Nauruan generation. We feel that Government propaganda aimed at shifting the blame to natural causes and evolution, is responsible for this unfair emphasis but have met with very little success. Although such factors may be regarded as contributory, it is wrong to attribute the necessity of resettlement wholly or primarily to them. We submit again that the main need for resettlement arises out of the physical destruction of the island and its attendant problems. Four-fifths of our island is phosphate-bearing and therefore in the end that much will be destroyed.
>
> We bitterly regret that in the recent discussions our delegation has failed to achieve what we had thought would be acceptable to both our people and in their mutual interest. We feel that despite your full knowledge of the relevant factors in the situation you have made no effort to compromise so that we could reach a mutually satisfactory agreement, but rather that your stand and your attitude on this most important and vital matter to our people are based on little else other than sheer strength in bargaining.
>
> We feel that we cannot secure a reasonably happy and satisfactory future on your terms for resettlement on Curtis Island and we have decided on behalf of our people that the idea should forthwith be abandoned. The properties of the Queensland people on Curtis Island who have been so upset on our account should not be acquired.
>
> Your representatives pointed out, and we had noted that the same Australian attitude would apply to all its off-shore islands irrespective of their distances from the mainland.
>
> We are left therefore, with no option but to look to our own island for a permanent future. We will remain on Nauru."
>
> (Nauru Talks 1964, pp.4-5.)

174. Once settlement on Curtis Island had been rejected, the Nauruans stated very clearly that as their future lay in Nauru, rehabilitating the quarried lands in full had become imperative. (Nauru Talks 1964, p.5.)

Section 8. Independence and Rehabilitation

A. THE REHABILITATION ISSUE

175. When the matter of resettlement/rehabilitation came up for discussion between the Australian and Nauruan delegations in Canberra in May-June 1965, the Chairman (Mr. Warwick Smith) of the Australian

delegation registered the Government's disappointment at the decision of the Nauruans not to proceed with resettlement on Curtis Island, and stated that it was hoped that the Nauruans would keep the issue alive, and not rely solely on other possibilities, such as a successful rehabilitation of the island. But the Australian delegation did propose that a committee be set up, to include a civil engineer, an economist and a soil expert, to investigate the issue of rehabilitation. It was suggested that selection of the Committee members be agreed upon with the Nauruans.

176. In relation to the problem of limited resources on Nauru, the following exchange took place between the Chairman and the Head Chief:

> "The Chairman pointed out the difficulties connected with an increasing population and the possibility of limited resources on the Island to feed that population. The question was whether the Nauruans saw agriculture as an avenue of employment or as a supplement to food, the bulk of which would presumably still have to be imported.
>
> The Head Chief replied that he could not ask his people to live on only one fifth of the island. Instead of four-fifths of the island useless they wanted they wanted all the island useful, or at least with trees. They believed that this would improve rainfall. They could at least live on the re-soiled land and use the coastal strip for agriculture. Since the Governments were prepared to restore the area of Curtis Island affected by mining for mineral sands why were they not prepared to undertake similar responsibilities on Nauru.
>
> The Chairman said that it was standard practice to rehabilitate mineral sands but not open cut mining or phosphate. He had mentioned these matters merely to indicate that the Governments' view was that rehabilitation was likely to be impracticable and ineffective in the long term. The Governments were however quite willing to see the proposed investigation committee set up to look into the question to help to get a common view, although this in no way committed them to meeting any costs for rehabilitating the island."
>
> (Record of Negotiations, 31st May-10th June, 2nd June p.m. 1965, p.6, 7; Annexes, vol. 3, Annex 2.)

177. In evidence before the Commission of Inquiry into the worked-out phosphate lands of Nauru in 1987, Mr Marsh, the former Director of Nauruan Resettlement, by now a retired public servant of the Australian Department of Territories, gave his own account of these events. He stated that, once the plan for Curtis Island was accepted, Australia was prepared to finance completely the setting up costs of the Nauruan community, involving transfer of the Nauruans, housing, roads, deep-water port, industries.

Secondly, resettlement was seen as the alternative to rehabilitation, so that when resettlement could not be achieved then the issue of rehabilitation revived. This was what led to the establishment of an investigative committee, the Davey Committee. One factor in this was the pressure being exerted by the Trusteeship Council. Thirdly, so far as Mr Marsh was aware, the Australian Government had not given much thought to what would happen, once the Nauruans had accepted Curtis Island, in relation to Nauru itself. The evidence of Mr Marsh, upon reflection, was that the Nauruans could not have been deprived of their homeland, where there would still be Nauruans living, even after resettlement. The Nauruans could still have obtained self-determination in the Trust Territory, and presumably the control of the phosphate industry. (See Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru, Transcript of Proceedings, 8 July 1987, Marsh pp.858-865: Annexes, vol. 4, Annex 73.)

B. THE DAVEY COMMITTEE

178. The Committee comprised Mr G.I. Davey (Chairman), a consulting engineer, Professor J.K. Lewis, Professor of Agricultural Economics, University of New England, N.S.W., and Mr W.A. Van Beers, a Soils and Land Classification Officer of the Food and Agricultural Organization. The Committee was appointed by the Australian Minister of Territories late in 1965, and was required to report by 30 June 1966. Its Report would be tendered both to the Administering Authority and the newly-established Nauru Legislative Council. For the text of the Report see Annexes, vol. 3, Annex 3.

179. The Committee was required to examine:

> "(i) whether it would be technically feasible to refill the mined phosphate areas with suitable soil and/or other materials from external sources or to take other steps in order to render them usable for habitation purposes and/or cultivation of any kind;
>
> (ii) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;
>
> (iii) estimated costs of any practicable methods of achieving restoration in any effective degree..."

The Committee was also instructed, assuming that some form of "restoration" was possible, to...

> "(i) investigate the water resources of Nauru;
>
> (ii) examine fully the possibility of growing in the areas to be restored, trees, vegetables and other plants of a utilitarian kind, having regard both to what was done in this way in the past and what might be most useful to the Nauruan people in the future."
>
> (*Report on Rehabilitation of Mined Phosphate Lands*, 1966, p.7.)

180. It was assumed by the Committee that an evaluation of possible measures for rehabilitation of mined areas from an economic point of view was expected. Further, the Committee understood its function to be primarily the provision of information concerning technically feasible methods of treating worked areas, the costs and benefits of alternative treatments and the implications of such actions.

181. The Committee itself affirmed the close connection between the issues of rehabilitation and resettlement. It described the background to the rehabilitation proposals as having arisen as a consequence of the refusal of the Nauruans to resettle on Curtis Island. The Committee put it in this way:

> "Upon rejection of Curtis Island, the Nauru Local Government Council considered it in the best interests of the Nauruans to remain in their own island. The question of rehabilitation of worked-out phosphate lands was then raised, bearing as it did on the capacity of the island to provide a satisfactory home for the Nauruans whose numbers are increasing at a rate of more than four per cent per annum."
>
> (*Report on Rehabilitation of Mined Phosphate Lands*, 1966, p.9.)

182. The Committee accepted that the concern of the Nauruans over the mined-out lands arose not so much because of loss of current useful production but because of the loss of opportunities for future utilization of these areas for habitation, agriculture or other purposes (id., p.10). With rising population density, dependence on imported foodstuffs would be greater and would reach an intolerable level unless something was done to counter the problem.

183. The Committee was cautious in its appraisal, but it saw a future for Nauru provided there was developed a co-ordinated land use plan based on an overall policy covering the whole of the island's land resources. The proposals of the Committee were limited but clear. It proposed a water supply system, a new airport (thus releasing the land on which the existing airport was located for residential purposes), the treatment of land to make it suitable for public and residential purposes, approximating 500 acres, and the vegetation of land extending to some 1120 acres. It estimated an expenditure of $31m to provide these facilities, and recommended such an expenditure. It also recommended a land use plan to accommodate a population of 10,000.

184. The details of the Committee's proposals -- which have to a large degree been superseded by the comprehensive and more thoroughly researched proposals of the Nauru Commission of Inquiry -- should not be allowed to detract from its real significance. This was, that rehabilitation, at least on a modified scale, was a cost-feasible possibility. Information coming from the British Phosphate Commissioners and the Administration had always been designed to show that rehabilitation was either completely impractical, or at least not in the usual course of mining. These assertions and assumptions, never previously examined or questioned in any detail. The Davey Committee's Report denied their validity.

C. THE GENERAL ASSEMBLY'S VIEWS ON THE REHABILITATION ISSUE

185. Once it became clear that the Curtis Island resettlement proposal was not going ahead, both the Trusteeship Council and the General Assembly took up the issue of rehabilitation. The General Assembly in 1965 recommended that the Administering Authority engage in a programme of restoring the worked-out lands. Resolution 2111 (XX) reads as follows:

> "*The General Assembly*,
>
> Having examined the chapters of the reports of the Trusteeship Council relating to conditions in the Trust Territory of Nauru,
>
> Taking note of the report on Nauru submitted by the United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1965,
>
> Having examined the chapters of the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting

of Independence to Colonial Countries and Peoples relating to the Trust Territory of Nauru,

Reaffirming the provisions of the Charter of the United Nations and General Assembly resolution 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Noting that, in compliance with the request of the Trusteeship Council at its thirty first session, the Administering Authority and representatives of the Nauruan people, in June 1965 at the Canberra conference, pursued further the question of a future home for the Nauruan people which would preserve their national identity,

Noting further the conclusions of the Trusteeship Council at its thirty second session to the effect that, as the Administering Authority was unable to satisfy fully the Nauruans' conditions that they should be able to resettle as an independent people and have territorial sovereignty in their new place of residence, and as the offer of Australian citizenship was unacceptable to them, the Nauruans decided not to proceed with the proposal for resettlement on Curtis Island and the Australian Government has discontinued action on this proposal,

Endorsing the conclusions and recommendations contained in the reports of the Special Committee concerning this Territory,

Recalling the proposals made by the Nauruan representatives to the Administering Authority for the establishment of a Legislative Council by 31 January 1966 and for the granting of independence on 31 January 1968 after two years of legislative experience together with experience through an Executive Council in the forms and procedure of democratic political administration and in the executive processes,

Considering the decision of the Nauruan people to stay on the island of Nauru and their request to the Administering Authority to restore for habitation by the Nauruan people, the land worked out by the Phosphate Commission,

(1) Reaffirms the inalienable right of the people of Nauru to self-government and independence;

(2) Calls upon the Administering Authority to take immediate steps to implement the proposal of the representatives of the Nauruan people regarding the establishment of a Legislative Council by 31 January 1966;

(3) Requests the Administering Authority to fix the earliest possible date, but not later than 31 January 1968, for the independence of the Nauruan people, in accordance with their wishes;

(4) Further requests that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation;

> (5) Calls upon the Administering Authority to report to the Trusteeship Council at its thirty third session on the implementation of the present resolution."

186. At the 33rd session of the Trusteeship Council, Mr Hammer DeRoburt, Head Chief of Nauru, addressed the Trusteeship Council:

> "48. With regard to the question of a permanent home-land he said that after the Australian Government and the Nauruan people had failed to reach an agreement on resettlement, there had been no alternative left for the Nauruan people but to decide to remain on Nauru. If they come to do so, the island would have to be completely rehabilitated and the Nauruans submitted that the responsibility for such rehabilitation rested with the Administering Authority. If Nauru attained Independence in January 1968, the Nauruans would have the responsibility. Roughly speaking the apportionment of responsibility would be as follows:
>
> The Administering Authority would bear one third of the responsibility for the rehabilitation, and the Nauruan people would be responsible for the remaining two thirds.
>
> (*Trusteeship Council Official Records*, 33rd Session, T/SR.1285, p.91.)

187. This has been the position of the Nauruan Government since independence (see paras. 1, 4, 193, 615-618).

188. The 33rd Session of the Trusteeship Council in 1966 was informed of the recent Report of the Davey Committee but was told that there had been insufficient time for full consideration of the Report, either by the Administering Authority or the Nauru Legislative Council. This meant that the Committee Report would not be before the Trusteeship Council until June 1967, only six months before the date set for independence.

D. PRE-INDEPENDENCE DISCUSSIONS OF THE REHABILITATION ISSUE

189. The position of the Nauruans in relation to the Davey Committee Report was stated by the Head Chief, Hammer DeRoburt, at the 1966 Talks between the Nauru Local Government Council and a Joint Delegation of the three Governments. (Nauru Talks 1966, Annex 11; Annexes, vol. 3, Annex 4.) As the statement revealed, the Committee's estimates of the cost of restoration indicated that the Nauruans could have a sustainable future on

Nauru if certain rehabilitation measures were carried out. For the Nauruans, the Head Chief stated:

> "6. Our people have been seeking restoration of the mined areas as a right to have returned to us adequate land for a permanent home. We were interested in resettlement only because it appeared to be an easier way of solving our problem, and the Administering Authority encouraged this by suggesting that it would be impossible to live on Nauru and, that even if we could, it would still not be in our best interests to do so.
>
> 7. To the Nauruans the most pleasing aspect of this report is that the Committee has confirmed our view that it is practicable for us to stay on Nauru. We have lived on this island for centuries, and when no other solution could be found we were sure that if the mined lands were restored it would be possible for us to remain on Nauru even though our views were not accepted by the Administration."
>
> (Nauru Talks 1966, pp. 58-59.)

190. The Head Chief accepted many of the ideas implicit in the Report, while rejecting the view that full restoration or re-soiling could not be achieved. (Nauru Talks 1966, pp. 62-77.)

191. The Joint Delegation's reply is set out in Annex 16 of the Report of the 1966 Talks. It rejected the preference of the Head Chief for complete restoration, but left open the actual recommendations in the Report on the basis that the three Governments had not had time to consider their implications. But there were hints in the statement that the partner Governments were hoping to avoid any discussion of rehabilitation. As there was no common view on the Report it was suggested as a fit subject for a joint examination by the Nauru Local Government Council and the three Governments. Nor was there any detailed discussion of the Report at the Trusteeship Council in 1966.

192. By 1967, attention was focused on the conclusion of arrangements for the transfer of the phosphate industry and for the transition to political independence. The issue of rehabilitation was not forgotten, but it was not central to the process leading up to independence. This was made clear by Head Chief Hammer DeRoburt in the Trusteeship Council on 22 November 1967: see below, paras. 609.

193. On the day of Nauruan independence, 31 January 1968, Hammer DeRoburt, as Chairman of the Council of State, publicly declared that the partner Governments should meet one-third of the rehabilitation costs of the worked-out phosphate lands (Melbourne "Herald", 1 February 1968; "*West Australian*", 2 February 1968; Sydney "*Sun*", 2 February 1968). See Annexes, vol. 4, Annex 69. This position, which remains that of the Applicant State, is the basis for the present Application before the Court.

PART II

THE SOCIAL AND ECONOMIC GEOGRAPHY OF NAURU

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Section 1. Geomorphology and Climate

194. Nauru is located 42 kilometres south of the equator at 166° 56' E, almost equidistant, some 4000 kilometres, between Sydney, Australia and Honolulu in Hawaii. Within its region Nauru is isolated. The closest island is Ocean Island (Banaba), which is approximately 270 kilometres to the East. (See Annexes, vol. 2, Map 1.)

195. The island of Nauru is small, being only 2200 hectares or 22 square kilometres in land area. It is more or less oval in shape, being about 6 kilometres north to south, and 5 kilometres east to west. (See Annexes, vol. 2, Map 3.) The outer limit of the territorial sea of Nauru is twelve miles from the edge of the reef surrounding the island. Being an uplifted, coral limestone island, the coastal reef extends seawards about 100 metres.

196. Situated just south of the Equator, Nauru is fortunate in that it has no history of cyclonic weather pattern or tidal wave action. However, during the wet season, extending from November to April, winds tend to come from the west and to develop sea squalls which inhibit the loading of phosphate for periods of time. Temperature throughout the year varies between a minimum of 23°C and a maximum of 35°C, with little variation between the dry and wet seasons.

197. Rainfall on Nauru is variable. Over a period of sixty years, the average annual rainfall was 1,994 millimetres. However, the variation is most marked. In 1930, rainfall was recorded at 4,590 millimetres whilst in 1950 it was only 280 millimetres. Most rain falls in the wet season from November to April. Nauru is susceptible to periodic drought.

198. The storage of fresh water is thus vital. Water supplies presently come from imported water held in large storage tanks, or tank water collected from roofs. The 1987 Nauru Commission of Inquiry, in the course of its detailed investigation of the possibilities for rehabilitation of the mined-out lands, quantified the extent and the quality of groundwater sources which can be tapped by wells:

> "Groundwater
>
> Oceanic islands having a relatively uniform geology and permeable rocks, without any rainfall, would have a water table and would correspond to sea level at all points sub-surface on the island. However, with the addition of percolating meteoric waters derived from rainfall, a fresh\salt water relationship builds up based on the difference in density of fresh water to salt water. The upper and lower surfaces of the fresh water body (or lens) are ellipsoidal, the lower surface extending below sea level to a depth that is equal to the height of the upper surface above sea level multiplied by the ratio of the density of fresh to the difference between the densities of fresh and salt water. For average sea water and rain water the ratio is about 40:1, i.e 40 units of fresh water below sea level to every 1 unit of head above. This lens is known as the Ghyben Hertzberg Lens.
>
> It has been known for many years that a water lens existed beneath Nauru. Test drilling and hydrological investigations in 1965-67 attempted to quantify the ground water but the results were inconclusive.
>
> Further investigation in 1987 by Dr. G. Jacobson of the Australian Bureau of Mineral Resources resulted in a Report to the effect that there exists, beneath Nauru, a discontinuous fresh water lens averaging 5 metres in depth. Beneath this lens there exists a mixing zone of brackish water 60-70 metres in depth. This brackish water, in turn, overlays the seawater below."
>
> (Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru, *Report*, 1988, vol.5, pp.1013-1014.[1])

199. With rehabilitation of the worked-out lands, consideration would need to be given to water storages or dams, supplemented by water run-off from roads and airstrip. A desalination plant could be a supplementary source of water, particularly in times of drought.[2] Both the Davey Committee in 1966 and the 1988 Commission of Inquiry made

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[1] The Commission of Inquiry consisted of Professor C.G. Weeramantry, Professor of Law, Monash University (Chairman), Mr. R.H. Challen, a consulting engineer, and Mr. Gideon Degidoa, Manager, Nauruan Language Bureau, Nauruan Department of Island Development and Industry. See the Note on Sources, above p.vii.

[2] The Government of Nauru has recently taken a decision for the establishment of a desalination plant as a supplementary source of water.

recommendations for resolving the water problem (Territory of Nauru, *Report by Committee Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Lands*, 1966, pp. 5, 30-32 (Annexes, vol. 3, Annex 3); Commission of Inquiry, *Report*, vol. 5, p. 1388).

200. The land area of Nauru is made up of a coastal plain and a central plateau stop a coral limestone escarpment. The coastal plain varies in width between 150 and 300 metres. The coastal plateau ("topside") ranges between 30 and 70 metres above sea level. On topside, there is one major internal depression in the southwest of the plateau. This is called the Buada Lagoon and is close to sea level. (See Annexes, vol. 2, Photograph 8.)

201. The reef is exposed at low tide and drops away sharply on the seaward edge. The depth of water immediately adjacent to the reef is approximately three to four thousand metres, enabling extremely large vessels to moor alongside the outer edge of the reef and be loaded with rock phosphate through giant cantilevers. (See Annexes,vol. 2, Photograph 10.)

202. The narrow fringing area or coastal plain contains soils of a weakly developed character with low water-holding capacity. However there is some organic matter accumulation over the limestone. The undisturbed topside soils are generally fertile. Levels of organic matter and the nitrogen content are high enough to maintain non-intensive cropping. (R.J. Morrison, "Comments on the Soils of Nauru", 1987, unpublished paper prepared for the Commission of Inquiry.)

203. The parent materials on Nauru vary from the fringing reef, which has calcite dominant limestone, to the topside plateau where there is a combination of dolomite and calcitic limestone together with phosphatic material dominated by apatite (Morrison, loc. cit., p.8). Apart from Buada Lagoon the topside plateau before mining presented a relief which was generally flat to gently rolling. Geologically, the coastal fringe is much younger than the topside plateau. The topside "overburden" or "black phosphate" varies in depth from 15 to 38 cms. It has a rich phosphate content but is deficient in nitrogen and potassium. This overburden was previously mined and then blended within the rock phosphate sold by the British Phosphate Commissioners.

204. The original vegetation of the topside plateau consisted of a *calophyllum* (Tomano) and ficus forest, amidst which pandanus groves were

planted. The area surrounding the Buada lagoon has a wider cultivation with coconuts, breadfruit, pandanus, mango, soursop and lime.

205. Considerable evidentiary material was presented on vegetation to the Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru. The part of the Report of the Commission of Inquiry dealing with Nauru vegetation is contained in Annexes, vol. 4, Annex 71. This material illustrates the availability before mining of a rich assortment of vegetation, the uses of which were many and various amongst the Nauruan community -- food, medicine, building, implements, canoes, perfumes and firewood.

Section 2. Phosphate Mining

206. The history of phosphate mining on Nauru in this century reveals a development from manual methods to a sophisticated and highly geared industry. The three successive methods of extraction -- manual hand-raising, overhead cableways with skips, and Ruston Bucyrus grabs and trucks -- the drying and screening processes, and loading are all described shortly in the Report of the Commission of Inquiry (see Annexes, vol. 4, Annex 72.)

207. Nauru has an area of 2200 hectares, 1700 hectares of which are classified as phosphate lands. On the topside plateau only the area immediately surrounding the Buada community has not been so classified. Mining began on the western side of the island closest to the loading point and, before July 1967, approximately one-third of the declared phosphate area was mined out (see Annexes, vol. 2, Map 3). Before July 1967 approximately 41 million tonnes of rock phosphate were mined: since that date almost the same amount has been mined by the Nauru Phosphate Corporation.

208. As the operations of mining became more skilled and mechanical methods took over from the manual, it became increasingly apparent to the Nauruan community that a very significant part of the island was quickly becoming unusable.

209. The Commission of Inquiry Report describes the situation in Nauru prior to mining in this way:

"The plateau was well covered with a mature forest of tomano, wild almond, native hibiscus and other indigenous trees with a somewhat sparse understorey of shrubs and grasses. Ferns prospered in hollows. Coconut palms and pandanus grew on the plateau -- generally where planted by the people. Coconut palms thrived in the lower levels of the Buada Lagoon area as also did mango and breadfruit trees. Noddy birds, terns and frigate birds utilised the trees for nesting, roosting and food and were there in considerable number.

The land was easily accessible and pleasant to walk over. The Nauruans, who lived on the coastal plain, used the plateau as a source of many of their essential supplies: timber for canoes; timber, palm fronds and pandanus leaves for hut building; timber to make tools, weapons and furniture; materials for clothing; fishing lines, etc. Nuts from the tomano trees were collected and crushed for oil to burn for light, almond nuts were collected for food.

Other berries, nuts etc. were collected for food or medicine. The Nauruans prize the noddy as a great delicacy and hunting parties sought them in the tomano forests.

Of particular significance were the pandanus groves. Pandanus were and still are highly esteemed as a source of food. The leaves were used for many purposes including clothing, ground mats, and for roof thatching. Woven into wall sheets they provided wind and rain protection in their huts etc. When the fruit was ripe the Nauruans moved up onto the plateau in large parties and lived there for long periods, picking the fruit, extracting and cooking the edible jelly and preserving food for the coming lean season. These pandanus expeditions involved many people. They were essentially clan or community undertakings. There was much work to be done and many hands were needed. It was also a time of rejoicing and the Nauruan community of today recall such events of the past with nostalgia."

(Nauru Commission of Inquiry, *Report*, 1988, vol.5, pp.1032-1033.)

210. But mining "changed the face of the land":

"Phosphate mining has had a drastic effect on topography and vegetation of the plateau. Prior to mining the land is stripped of vegetation, and topsoil and contaminated phosphate are scraped off, thus exposing the phosphate deposits. Since most of the phosphate is found between the coral-limestone pinnacles, its extraction results in a dramatic change in local relief which varies between 4 and 8 metres from the top of the pinnacles to the pit bottoms. An average of about three or four pinnacles can be found to occur within each 100 m^2. Because the mining process is relatively inefficient, up to 20 per cent of the phosphate remains after extraction (Bailey 1981), forming unconsolidated deposits in the pit bottoms as well as on the saddles and scree slopes between the pinnacles. These deposits

> which may be mined at a later date, and, to a lesser extent, the pinnacles surfaces, provide the main sites for recolonization and revegetation.
>
> As phosphate extraction completely removes the original vegetation and soil and exposes a new substrate, the vegetation sequence that develops on the mined areas may be classified as a primary succession, albeit one produced through drastic human intervention.
>
> Despite the economic prosperity resulting from the exploitation of phosphate, by the end of this century an estimated four-fifths (or 1760 hectares) of the total land area will have been transformed into a pitted wasteland of scattered coral pinnacles which can be best described as a 'topographic jungle' or 'pit-and-pinnacle' relief."
>
> (Manner, Thaman & Hassall, "Plant Succession after Phosphate Mining on Nauru", *Australian Geographer*, vol. 16 (1985) p. 187.)

211. At the conclusion of mining any given area, there remains a sea of coral limestone pinnacles, usually with a depth of four or five metres to the pit bottom and with the pinnacles close together (see Annexes, vol.2, Photograph 5).

212. Before the island was mined, Nauruan landowners were able to identify their own areas of land through stone boundary markers. Various trees were grown on this land, such as pandanus and coconut which were much valued. But once mined, the areas become completely inaccessible and, without careful survey, almost unidentifiable (see Annexes, vol. 2, Photograph 2). The most populous part of the island is along the narrow coastal western fringe strip. Apart from pockets of forest, the main one surrounding the Buada lagoon in the south-east, the island is nearly mined out (see Annexes, vol.2, Photographs 1 & 8). The Buada area provides a marked contrast to the rest of the topside plateau and provides some indication of the plateau's appearance before mining (see Annexes, vol. 2, Photographs 8 & 9).

213. After a period of time a weathering and regenerative process takes place on earlier mined land. The pinnacles gradually become dark grey with age, worn and more jagged. Natural regeneration at first occurs in the pit bottoms with ferns and small bushes, and then later with vines and trees, particularly *ficus*. (See Manner, Thaman & Hassall,"Phosphate Mining: Induced Vegetation Changes on Nauru Island", *Ecology*, vol. 65 (1984) p. 1459.) Early mined-out areas witness a substantial regeneration but owing

to the pinnacle proliferation, such land is inaccessible and completely unusable (see Annexes, vol. 2, Photographs 4 and 5).

Section 3. Social Effects Of Phosphate Mining

214. The lifestyle of the Nauruan people has been affected by mining in a number of ways. Basically, from being a homogeneous island people existing in a subsistence economy and without much external contact, the island has become totally industrialised and completely dependent on imports for its sustenance -- food, water and clothing -- and its development, building materials, vehicles, and consumer goods.

215. In the pre-mining period, the topside plateau provided a very important part of the social life of the Nauruan. It was that area which provided timber for the house, where it could take up to two months to collect, cut and stack materials. At that time the Nauruan family would go to the plateau and live under temporary shelter, eating the fruits of the pandanus and hunting the noddy birds whilst seeking the materials for the coastal house.

216. The cultivation and care of the pandanus is described by Camilla Wedgwood, who carried out her research on Nauru in 1935 at the invitation of the then Australian administrator, Commander Garsia, R.A.N., and with the authority of the Australian Minister for Territories.

> "The cultivation and care of the pandanus trees was primarily the word of the women, though the men helped in the initial clearing of the land and in the planting. This was done during the time of the westerly winds when the rainfall is most plentiful. There are a considerable number of different varieties of pandanus (of which each has its own name) some with sweet fruit, some with sour, which lend themselves to different treatment, and some which are more valuable for their leaves (from which thatch, mats, petticoats and other objects are made) than for their fruit. The pandanus flowers usually during January and February and the fruit is ready for gathering about August or September. Formerly, when the time for the pandanus harvest (*ineded*) had come, the people used to leave their homes on the coast and go to dwell in more or less temporary bush huts on the pandanus lands in the interior. Sometimes all the members of a homestead helped in the gathering of the fruit, but the men generally spent most of their days in fishing, and only returned inland for the night. Commonly two or three sisters with their children worked together, for picking the pandanus fruit and turning it into *edono* entails heavy labour and requires the co-operation of a

> number of people throughout the two or three months of harvest. Young girls unite to carry water from the home-wells to the temporary settlements, for there is no water to be had in the bush-lands; groups of two or three youths or your men work together picking the fruit, and if there is no old oven which can be used for the cooking some men will dig a new one and collect from nearby coral pinnacles the necessary cooking stones; the women do all the work connected with the actual cooking of the fruit and the small children are kept busy collecting fuel. The process whereby the juice is extracted from the fruit after the first cooking is primarily the work of young men, and if anyone is known to be engaged in a big pandanus gathering, they will come from other homesteads and even from other districts to where the work is being done and hold a pandanus-squeezing competition, either working individually or in groups. This was the only stage in the harvest and making of *edono* which was at all festal. My informants impressed upon me that the people had to labour much too hard during the harvest season to have any leisure for dancing or singing or any other such relaxations. When all the pandanus fruit had been gathered and turned into preserve, however, there was, in olden times, a great harvest festival at which the people danced and sang songs about the pandanus. Where this festival was held my informant did not know since none had taken place during his lifetime, but it seems probably that the dancers and singers went round the island performing at each place they came to, for such touring parties seem to have been characteristic of old Nauruan life."
>
> (C.H. Wedgwood, "Report on Research Work in Nauru Island, Central Pacific", *Oceania*, vol. 7 (1936) pp. 8-9.)

216. Wedgwood rated the influences on cultural change in chronological order as the coming of the missionaries and the discovery and working of the phosphates. With some perception, she noted the acute change that had taken place by 1935 in these terms:

> "...to be healthy, a culture must develop gradually, and that any great change in the cultural environment to which the society has to make a swift adaptation is liable to weaken that society, or at the least puts a very great strain upon it. To wipe away all that is old and native to a people, and to introduce or force upon them an alien civilization, may at first seem to be a successful venture, but it does not make for a stable or healthy society and lays up trouble for the future. This is the danger in Nauru...The great need in Nauru to-day seems then to be a means of linking the past with the present; of restoring that personal dignity and self-respecting mode of life for which the peoples of the Central and East Pacific have long been noted, while yet enabling the islanders to reap benefits from the complex European civilization with which they have been brought in contact; to develop a people who will take a pride in being Nauruans and not in being imitators of Europeans."
>
> (Wedgwood, loc. cit., pp.361-2.)

218. In the present situation, Nauruan houses are western in style, and are often imported in fabricated form from Australia A substantial proportion of food is imported, and water is also imported in large tanker vessels. The Nauruan culture, dances, chants, food procedures are all but forgotten, in the acceptance of Western ideals, religion and lifestyle (Wedgwood, loc. cit., p.33). Any rehabilitation of the island involving development would have to take the presently changed nature of the lifestyle and the modern requirements of the Nauruan community into account.

219. In this regard, current population pressure is an important factor. The land surface of Nauru is finite, but without rehabilitation of mined-out areas, the usable surface for whatever purpose would be reduced by 80%.

Section 4. Population Growth

220. Before the Second World War, the indigenous population of Nauru remained for the best part of a century remarkably static at between 1,300 to 1,600. During the Second World War a large number of Nauruans were deported by the Japanese occupation command to the Micronesian island of Truk. From an indigenous population of 1,848 in 1942, there was a reduction as a result of the War to 1,369 in 1946.

221. Since 1946, there has been a remarkable rise in the indigenous population. The census statistics reveal the following figures:

Year	Population
1950	1,582
1960	2,327
1967	3,011
1977	4,174
1983	4,964

222. Demographic estimates since 1983 provided by the Nauruan Department of Island Development and Industry would base the indigenous population in 1990 at 5,285. The estimate for the year 2000 is 8,200. The rise in population was foreseen by the Australian Administration. In 1966, the Davey Committee Report (see Annexes, vol. 3, Annex 3, p.18) based its

recommendations on a projected population of 10,000 Nauruans by the turn of the century.

Section 5. Nauruan Identity

223. In the census figure of 4,964 in 1983, only 294 Nauruans were included who were abroad. The greater proportion of these were students studying in Australia and New Zealand on Nauru Government scholarships. Very few Nauruans ever leave Nauru permanently. There is no emigration such as occurs in other Pacific Islands such as Western Samoa, Tonga or Niue.[1] The sense of belonging is strong.

224. The smallness of the island and its population tends to promote a tight, homogeneous community. But there are other factors which develop strong Nauruan identity. The unique Nauruan language has produced a closeness in community culture and knowledge, particularly of custom. The Nauruan language is the main source of communication between Nauruans.

225. Land is central to the Nauruan identity:

> "Nauruans enjoy the right of freehold title to their lands by virtue of heredity. The system of land holding is governed by the custom and usages of the Nauruans. Practically the whole of the Island, with the exception of small areas gifted to the Missions or acquired by past administrations is owned by individual Nauruans.
>
> Subject only to the custom and usages of the people and, more recently, laws relating to disposition of title to land, each land owner acquires title by descent, through will or intestacy, or by gift *inter vivos*. That the sale of land has not been part of the Nauruan custom does not alter the fact that by custom landowners enjoy the full rights of disposition of their lands. This right of disposition includes, because of the absolute nature of ownership, everything upon as well as everything in and below the surface of the land."
>
> (B. Dowiyogo, "The Law of Land Holding in Nauru" (unpublished paper prepared for and deposited with the Nauru Commission of Inquiry 1989); Annexes, vol. 4, Annex 74.)

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[1] Movement from Pacific islands to metropolitan territories is considerable, except for Nauruans. Only one-quarter of Niueans live in Niue, the remainder are in New Zealand. Thirty-two thousand Tongans live overseas, whilst 110,000 are in Tonga. Half the population of Wallis and Futuna islands live permanently in New Caledonia. (R.G. Ward, "Earth's Empty Quarter? The Pacific Islands in a Pacific Century", *The Geographical Journal*, vol. 155, no. 2 (1989) p. 243.)

226. The Nauruan conception of land ownership extended to trees, wells, reefs and fishing grounds.

> "Almost every native on Nauru is the owner of land or palms... Just like every small piece of land and each palm, so the reef that surrounds the island and the sea washing the shore, all have their owner. For example, no native is allowed to let down his fishing basket outside the reef without first having obtained permission by the owner of that particular part of the sea...The 'sale' of land happens rarely, but the exchange of different lots happens frequently."
>
> (Jung, *Aufzeichnungen uber die Rechtsanschau-ungen der Eingeborenen von Nauru; Schutzgebeiten*, X Bd., Berlin, 1987, p. 67, quoted in Dowiyogo, op. cit., p. 16.)

Such arrangements were derived from custom which had pronounced legal effects in Nauruan society.

> "Their notion of justice and law arose out of their thinking and feeling. It led to basic laws of a public or private nature. They have been transmitted orally. They were adjusted to the continuing development and found their expression in a code of 'customary law'. These notions of law cover a wide spectrum: land, reef, ocean, tree, animal house, tools, family, nation etc. With the highly developed people of Nauru these ideas have taken on a definite legal character and many were to be found to be so well applicable, that one bases decisions in important legal matters on this law. They are gradually being incorporated and adjusted to our sense of justice and the Civil Code."
>
> (P. Hambruch, *Nauru*, L. Friederichsen & Co., Hamburg, 1914, p. 291.)

228. Land law was an intimate part of the legal web of custom, involving various facets of society. Though Nauruans today have become heavily influenced by European mores, nevertheless the attitudes towards land and family are strongly directed by custom.

Section 6. The Economy

229. In the earlier subsistence economy of Nauru, the great influence on life was climate. Drought, a fairly common phenomenon, was the determinant of the availability of water and coconut. The arrival of the

European introduced western diseases which at various times had a deleterious effect on the population.

230. In the German period, the significance was not as great. The area mined was small (Annexes, vol. 2, Map 4: the area marked "E" shows the position as at 1913), and the amounts paid to the Nauruans were miniscule. Nauruans, whilst subject at this stage to western influences and government, nevertheless were still involved in a subsistence economy, combining fishing with coconut and pandanus (on the plateau), and using the plateau for the daily requirements of wood, housing material, canoes and implements.

231. With the introduction of overseas goods and foods, Nauruans became more and more dependent on returns from phosphate for everyday existence. Government services, such as police, medical, educational, electrical supplies, works, were paid for out of the returns of phosphate. With the diminution of land supply, Nauruans became more dependent on phosphate returns, as the subsistence economy faded out.

232. In the *Report of the Administration of Nauru to the Council of the League of Nations during the year 1928* (p. 37), there is a comparative statement of revenue for the five years ended 31 December 1928. Of the total revenue collected during these years, the royalty on phosphate exports, as it was then termed, annually contributed between 35% and 45% of the revenue. In the period 1924 to 1928, a substantial contribution to revenue came from import duty and a capitation tax. Import duties carrying a high rate of duty were, tobacco, drapery, footwear, and motor vehicles and accessories. The "royalty" payment was based in those years on a rate of six pence per ton of phosphate exported. Expenditure during these years was very moderate. Where there was specific expenditure required for the Nauruan Community it was largely funded from a further royalty paid to the Nauruan Royalty Trust Fund. That Fund paid for native education and a number of miscellaneous public works for Nauruans (*Report*, p.40).

233. A comparison with the years 1961-1962 to 1965-1966 reveals a rather different picture. Revenue figures have risen from a few thousand pounds to sums of over a million dollars Australian. However, what was previously described as the royalty on phosphates exported is now simply described as "payment by the British Phosphate Commissioners": this represents 90-95% of total revenue collected. Import duties have all but disappeared. The only other revenue provider of substance is the radio station and post office which

in 1965-6 provided some 7.5% of revenue. (Territory of Nauru, *Report for 1965-6*, 1966, p. 29.) This revenue met all the expenditure of the Administration including capital works. (*Report*, pp.80, 81.) Capital works for Nauruan housing, however, came from the proceeds of the Nauruan Royalty Trust Fund. (*Report*, p. 83.)

234. After 1968 the dependence on the returns from phosphate is further demonstrated by government revenue and expenditure figures. It is during this period, after independence, that resources are built up through the amounts paid annually to the Nauru Phosphate Royalties Trust for investment.[1] Such amounts are withdrawn as a percentage directly from each ton of rock phosphate exported. This revenue meets both the day to day costs of government together with any developmental expenditure. The Nauru Government's annual accounts reveal that since independence the percentage of the revenue of the Government derived from phosphate varies between 55% and 70%. The only other major source of income within the economy is also phosphate based. This is the amount paid to the individual landowner in capital sum at the time his or her individual allotment is mined.

235. The Nauru Phosphate Royalties Trust set up by Ordinance in 1968, one week before independence, is required by statute to administer two major funds, the Nauruan Community Long Term Investment Fund, and the Nauruan Land Owners Royalty Trust Fund. The first fund is a Government fund (see para. 124) to be accumulated and not paid out until "the economic life of the phosphate deposits in Nauru is substantially ended" (Nauru Phosphate Royalties Trust Ordinance 1968, s.18(2); Annexes, vol.4 Annex 41). The purpose of the Fund is to establish a solid financial base for the Government against the time when receipts from phosphate have ended. The other fund, established by section 19 of the Ordinance, has the object of paying landowner beneficiaries after a certain date.

236. In the result the economy is built almost entirely on the proceeds of the export of rock phosphate, placing Nauru very much at the mercy of the vagaries of the overseas price of phosphate from time to time. Furthermore, as the sales of phosphate subside due to the exhaustion of supplies, either some other export commodity needs to be developed or a reduction in the dependence on imports.

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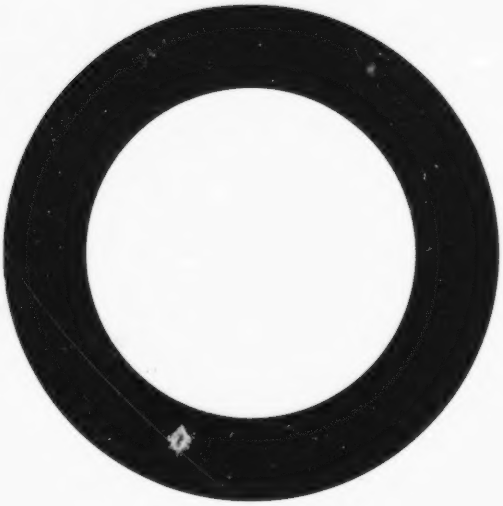
[1] The Rehabilitation Fund was established by the Nauru Government in 1968, and is administered by the Nauru Phosphate Royalties Trust. Its purpose is to accumulate funds for the rehabilitation of land mined since 1 July 1967. The Fund has accumulated approximately A$240 m.



PART III

THE BASES OF RESPONSIBILITY

PART III

CHAPTER 1

THE BREACHES OF INTERNATIONAL LAW FOR WHICH AUSTRALIA IS RESPONSIBLE

Section 1. Introduction: the Purpose of this Part

237. The purpose of this Part of the Memorial is to elaborate upon the principal bases of responsibility (or causes of action) upon which the Applicant State relies. At the same time Nauru confirms its reservation of the right to supplement or amend its Application, contained in paragraph 50 of the Application.

238. Subject to this reservation, the pertinent heads of claim will be examined in this Part in the following order:

(a) Breaches of the Trusteeship Agreement and of Article 76 of the United Nations Charter (Chapter 2).

(b) Breach of international standards applicable in the administration of the trusteeship: that is to say, the principle of the self-determination of peoples and its corollary, the right of peoples and nations to permanent sovereignty over their natural wealth and resources (Chapter 3).

(c) Denial of justice *lato sensu* (Chapter 4).

(d) Abuse of rights and acts of maladministration (Chapter 5).

(e) Breach of the duties of a predecessor State (Chapter 6).

(f) Failure to make restitution of the overseas assets of the British Phosphate Commissioners (Chapter 7).

239. The exposition of these bases of liability will be followed (Chapter 8) by a consideration of the forms of loss caused to Nauru as a result of the

breaches of international legal duties for which Australia is responsible. In the circumstances of this case the Government of Nauru believes that the specification of the forms of loss will be of particular assistance to the Court in its appreciation of the bases of liability.

Section 2. Certain Reservations

240. It is necessary to preface the substance of this Part of the Memorial with certain reservations of position.

241. The first such reservation relates to the validity of the Nauru Island Agreement of 1919. The exposition of the bases of liability rests on the assumption that the Agreement remained valid throughout the relevant period of time. However, the Applicant State reserves its position as to the validity of that instrument and its right, if it sees fit, to present arguments in the alternative.

242. The second reservation flows inevitably from the form which the calendar of proceedings in this case so far has taken. The Respondent State has not made any preliminary objections, whilst maintaining the right to do so within the term allowed by the Rules of Court. In these circumstances the Applicant State will approach the case on the basis that issues of admissibility have been resolved in its favour or, strictly speaking and in procedural terms, have been completely left on one side. Consequently, the Applicant State formally reserves its position on all questions of admissibility and affirms that the Respondent State has the burden of proof in respect of questions of admissibility if and when such matters are properly put in issue.

PART III

CHAPTER 2

BREACHES OF THE TRUSTEESHIP AGREEMENT AND OF ARTICLE 76 OF THE UNITED NATIONS CHARTER

Section 1. Content of the Relevant Obligations

243. The Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1st November 1947 (Annexes, vol. 4, Annex 29), together with Article 76 of the United Nations Charter, provides the necessary background to the present case. The important obligations set forth in these instruments form the primary causes of action on which the Republic of Nauru relies.

244. The key provision of the Trusteeship Agreement, Article 3, provides as follows:

> "The Administering Authority undertakes to administer the Territory in accordance with provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter."

245. Article 76 of the United Nations Charter, which is independently applicable, provides:

> "The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
>
> (a) to further international peace and security;
>
> (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement;

> (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
>
> (d) to ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."

246. The remaining provisions of the Trusteeship Agreement which are particularly relevant are as follows:

> "Article 4
>
> The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Government of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.
>
> Article 5
>
> The Administering Authority undertakes that in the discharge of its obligations under Article 3 of this Agreement:
>
> 1. It will co-operate with the Trusteeship Council in the discharge of the Council's functions under Articles 87 and 88 of the Charter;
>
> 2. It will, in accordance with its established policy:
>
> (a) take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory; and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant of Nauru may be created or transferred except with the consent of the competent public authority;
>
> (b) promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants;

> (c) assure to the inhabitants of the Territory, as may be appropriate to the particular circumstances of the Territory and its peoples, a progressively increasing share in the administrative and other services of the Territory and take all appropriate measures with a view to the political advancement of the inhabitants in accordance with Article 76b of the Charter;
>
> (d) Guarantee to the inhabitants of the Territory, subject only to the requirements of public order, freedom of speech, of the press, of assembly and of petition, freedom of conscience and worship and freedom of religious teaching.
>
> Article 6
>
> The Administering Authority further undertakes to apply in the Territory the provisions of such international agreements and such recommendations of the specialized agencies referred to in Article 57 of the Charter as are, in the opinion of the Administering Authority, suited to the needs and conditions of the Territory and conducive to the achievement of the basic objectives of the Trusteeship System."

247. These provisions are clearly standard-setting in character and involve the application of the standards and obligations of general international law to a particular territory.

Section 2. The Legal Nature of the Obligations

248. There can be no basis for any inference that the obligations contained both in Article 76 of the Charter and in the provisions of the Trusteeship Agreement involve commitments which were not taken seriously, in the same way as the other solemn legal commitments of states. Like many provisions in "minorities" treaties and instruments, bilateral or multilateral, concerning human rights matters and social questions, they are standard-setting and normative; and such a function supports the presumption that the provisions involve legal obligations.

249. Once the particular territory had become the subject of the legal regime of trusteeship in accordance with the Charter, the relevant standards

applied as standards of general international law. The application of the system of trusteeship by the General Assembly certified that the particular territory was subject to the obligations concerned: and the principles of the trusteeship system then applied as standards of general international law. There are grounds for the view that the application of the regime of trusteeship to former mandated territories like Nauru was automatic, in any case, but the nature of the obligations as general norms followed from the characterisation as a trusteeship territory and did not depend on any premiss that the trusteeship system was compulsory, rather than voluntary, in character.

250. There is no reason to doubt that the fundamental principles of the trusteeship system formulated in Article 76 of the Charter and reflected in the Trusteeship Agreement for the Territory of Nauru (and in all other such instruments) provide a basis for a legal claim on the part of a State with a legal interest. Provided that a legal interest exists, the fact that the trusteeship terminated at the time of independence does not stand in the way of the vindication of the principles of the trusteeship in respect of the period when they were operative. Both during the currency of the Trusteeship Agreement and since its termination the obligations of the Administering Authority could be the basis of a claim by any Member of the United Nations, or by any state with an equivalent standing as a consequence of its entitlement to become a party to the Statute of the Court, or otherwise.

251. In the circumstances in which Nauru achieved independence, there is in addition a special title to standing resulting from the principle of self-determination, which is recognised as a principle of the United Nations Charter and forms a part of general international law.

252. In this connection Nauru is not placed under any incapacity simply because the operation of the trusteeship came to an end at independence. The legal aspects of the performance of the duties of trusteeship remain actionable at the behest of any State with a sufficient legal interest. This is particularly so in that the independent State of Nauru now represented the people which was the beneficiary of the Trusteeship Agreement.

253. Without prejudice to the foregoing, there are additional and independent bases of the actionability of the obligations of the trusteeship regime at the instance of the Applicant State. In the first place, the nature of the trusteeship regime is such that the obligations which it generates must

rank as obligations *erga omnes*, a category recognised by the Court in its judgment in the *Barcelona Traction Case (Second Phase)*, I.C.J. Reports, 1970, p.4 at p.32.

254. In fact the Permanent Court had long ago recognised that certain types of standard-setting regime would have effects erga omnes: see *The Wimbledon* P.C.I.J., Ser. A. No. 1, pp.22, 28; and the views of Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp.267-8. Secondly, there can be little doubt that the principles of the trusteeship system also have the status of principles of *jus cogens*, because they involve the application of fundamental norms of human rights.

255. The relevant passages from the Judgment in the *Barcelona Traction* case are as follows:

> "33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p.23); others are conferred by international instruments of a universal or quasi-universal character."
>
> (I.C.J. Reports 1970, p.4 at p.32.)

256. In the latter passage the Court explicitly recognises that the category of obligations *erga omnes* includes "the principles and rules concerning the basic rights of the human person" and by implication that the implementation of such basic rights is a major objective of the trusteeship system according to the provisions of Article 76 of the United Nations Charter.

257. The concept of obligations valid *erga omnes* is supported by authoritative opinion: see, for example, Judge Mosler (as he then was), *The International Society as a Legal Community*, Alphen aan den Rijn, 1980, pp.19-20, 134-6. Moreover, the concept is for most practical purposes identical to that of *jus cogens*, a concept which has received widespread recognition from authoritative opinion. The evidence of such general acceptance is by no means confined to the well-known provisions in Articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties concluded in 1969.

258. Thus, as long ago as 1957, Sir Gerald Fitzmaurice, in his lectures at the Hague Academy, referred to:

> "...certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but malum in se, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of jus cogens -- that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal vis major."
>
> (*Hague Recueil*, vol. 92 (1957, II) p.120; and see also at pp.122, 125.)

259. The extensive acceptance given to the concept of jus cogens by the most highly qualified publicists of the various nations is amply evidenced by the following sources: Fitzmaurice, *British Year Book of International Law*, vol. 35 (1959), pp.224-5 (also published in Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, pp.626-7); McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp.213-15; Waldock (Special Rapporteur of the International Law Commission), Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1963, II, pp.52-3, paras. 1-6; Quadri, *Hague Recueil*, vol. 113 (1964, III), pp.335-8; Jennings, *Cambridge Essays in International Law*, London, 1965, pp.73-4; Verdross, *American Journal of International Law*, vol. 60 (1966), pp.55-63; Morelli, *Rivista di diritto internazionale*, vol. 51 (1968), pp.108-17; Judge Ammoun, Separate Opinion in the *Barcelona Traction case*, I.C.J. Reports 1970, p.304; Ago, *Hague Recueil*, vol. 134 (1971, III), p.324 (note 37); Tunkin, *Theory of International Law*, London, 1974, pp.147-60; Ago (Special Rapporteur of the International Law Commission), *Yearbook of the International Law Commission*, 1976, II (Part One), pp.31-32, paras. 98-

99; Jiménez de Aréchaga, *Hague Recueil*, vol. 159 (1978, I), pp.62-8; Podesta Costa & Ruda, *Derecho Internacional Publico*, 5th ed., 1979, I, p.30; Nguyen Quoc Dinh, Daillier & Pellet, *Droit International Public*, Paris, 1987, pp.107, 185-91; and the Counter-Memorial submitted by the United States in the Jurisdiction Phase of the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 17 August 1984, pp.126-7, para. 314.

260. The subject-matter of *jus cogens* was summarised by Judge Ago in his lectures at the Hague Academy in 1971 thus:

> "If one examines carefully the opinions expressed in the International Law Commission and, more generally, in the writings of jurists, one becomes aware that a certain unity of views exists with regard to the determination of the rules which the consciousness of the world regards today as rules of *jus cogens*. These include the fundamental rules concerning the safeguarding of peace, in particular those which prohibit any recourse to the use or threat of force, fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and of war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (the high seas, outer space, etc.)."
>
> (*Hague Recueil*, vol. 134 (1971, III), p.342, note 37; reproduced in English translation, *Yearbook of the International Law Commission*, 1976, II (Part One), p.32, note 148.)

261. The legal character of the concept of trusteeship is confirmed by the long recognised status of that concept as a "general principle of law". For the convenience of the Court the Government of Nauru has commissioned a comparative survey of the law of trusts and trust-like institutions prepared by a leading expert in the field, Professor A.M. Honoré (Appendix 3).

262. In paragraph 3 of his study Professor Honoré states (by way of summary) that "the picture that emerges is of the universal availability and pervasive use of protective institutions, by which persons (trustees, guardians, curators, administrators or the equivalent) hold an office which involves a fiduciary duty to administer for purposes other than their own private interest assets which are separate from their own private property". Professor Honoré emphasises the wide diffusion of trust-like institutions and especially guardianship and curatorship, in civil law systems (Appendix 3, paras. 44-56).

263. There can be no doubt that the principle of trusteeship established during the United Nations Conference on International Organization, and embodied in Article 76 of the Charter, was based on the broad concept of trusteeship reflecting the general institutions of guardianship and curatorship.

264. This concludes the exposition of the views of the Applicant State on the legal nature of the obligations deriving from the regime of trusteeship. The Court is respectfully reminded that, at the present stage of the proceedings, and in the absence of preliminary objections, the Applicant State formally reserves its position relating to all issues of admissibility.

Section 3. The Particulars of the Breaches of the Trusteeship Agreement and of Article 76 of the United Nations Charter

A. THE STATUS QUO SINCE 1919

265. The appreciation of the situation in the period between the beginning of the trusteeship regime in 1947 and the independence of Nauru requires an understanding of the status quo depending upon the Nauru Island Agreement of 1919 and the Mandate for Nauru of 1920. Once created, the legal structure of the years 1919 and 1920 remained essentially in place until the time of independence, and this aspect of the situation was well-recognised by the United Nations Visiting Mission in the period of trusteeship: see the Visiting Mission Report, 1950, paras. 14-19; Visiting Mission Report, 1956, paras. 24-25; Visiting Mission Report, 1962, paras. 96-115 (and, in particular, paras. 101-2).

266. The developments in the early years of the Mandate have been examined in Part I: for present purposes it is necessary only to identify certain key features of the legal regime emplaced in these years. The most striking feature emerges from the text of the Nauru Island Agreement itself. The preamble indicates its duality of purpose: "whereas it is necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island". However, the practical arrangements contained in the Agreement gave primacy to the second of these purposes and thus any tension in the duality of purposes was always likely to be resolved in favour of the exploitation of the phosphate deposits with the minimum of cost or delay or hindrance of any kind.

267. It was in this context that Article 9 of the Agreement provided as follows:

> "The deposits shall be worked and sold under the direction, management, and control of the Commissioners subject to the terms of this Agreement.
>
> It shall be the duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend."

This provision made no reference to the purposes of the Mandate even as a subsidiary element.

268. The key provision of the Agreement, the prelude to Article 9, is Article 6, which provides as follows:

> "The title to the phosphate deposits on the island of Nauru and to all land, buildings, plant and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners."

This provision involved the expropriation of the phosphate deposits and the assumption of extensive regulatory powers affecting the system of land tenure on Nauru.

269. This regime was focused upon the exploitation of the phosphate deposits as an end in itself by the British Phosphate Commissioners as an instrumentality of the three Governments. A significant constituent of the regime was the limited role permitted in practice to the Administrator appointed by Australia in relation to the powers, both formal and actual, of the British Phosphate Commissioners. The outcome was a regime the predominant purpose of which was certainly not the promotion of the material and moral well-being and the social progress of the inhabitants in accordance with Article 2 of the Mandate.

B. The Inheritance of this *Status Quo* in 1947

270. The Trusteeship Agreement for the Territory of Nauru was approved by the General Assembly on 1 November 1947 and the Governments of Australia, New Zealand and the United Kingdom were designated "the

Administering Authority" (Article 2). Article 3 provided that "the Administering Authority undertakes to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship system, which are set forth in Article 76 of the Charter".

271. Article 4 provided as follows:

> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory."

272. In fact the Trusteeship regime simply inherited the status quo established by the Nauru Island Agreement of 1919 (and the subsequent Agreement of 1923). The Nauru Island Agreement was eventually terminated by an Agreement concluded in Canberra on 9 February 1987. (Annexes, vol. 4, Annex 31). The position of the Applicant State is that the continuance in force of the Agreement of 1919 and the concomitant legal regime within Nauru in the period of trusteeship was anomalous. The purposes of that Agreement and the accompanying apparatus of exploitation and Australia's persistent reticence as to the financial ramifications of the Agreement were plainly incompatible with the discharge of the duties arising for the Respondent State from the Charter and the Trusteeship Agreement.

C. THE ATTITUDES OF THE AUSTRALIAN GOVERNMENT IN THE TRUSTEESHIP PERIOD

273. The attitudes of the Australian Government during the Trusteeship are revealing, in particular, because these attitudes confirm the position of the Respondent State that the central concerns of this body were the control and exploitation of the phosphate deposits on terms not revealed to the responsible organs of the United Nations. Further consideration will be given to Australia's conduct as evidence of violations of her legal obligations in Part IV of the Memorial. For present purposes it is sufficient to point to certain aspects of Australia's conduct in the years immediately preceding independence.

274. Given the normal evidential presumptions of continuity and consistency, the attitudes and views adopted by Australian representatives in the period 1965-1967 may be presumed to indicate the positions maintained for the entire term of the Trusteeship.

275. During the negotiations between the Nauru Local Government Council and Australian officials in 1965, the Australian side adopted the following positions on the central questions affecting the political and economic development of Nauru and its people:

(a) The governing instrument was the Nauru Island Agreement of 1919;

(b) The British Phosphate Commissioners had an exclusive entitlement to mine the phosphate deposits;

(c) The legal position in respect of the working of the phosphate deposits had not changed since the beginning of the Mandate (see in particular the *Record of Negotiations, 31st May -10th June 1965*, Annex J, p. 12, para. 26; and see the Record, meeting of 3rd June, 10.30 a.m., passim; Annexes, vol. 3, Annex 2).

276. The position had not changed in any material respect when the Canberra talks on the Nauru phosphate industry took place in the period 14 June-1 July 1966 (Record of Discussions) (Annexes, vol. 3, Annex 4). These talks were held between a Nauruan Delegation and a Joint Delegation representing the Administering Authority. There is no evidence that the views of the Australian Government on the essentials of the legal regime had changed at any stage before the time of independence.

277. The Annual Reports to the General Assembly on the Administration of the Territory of Nauru submitted by the Commonwealth of Australia in the period of Trusteeship give no prominence to the Nauru Island Agreement of 1919 (see the *Report from 1st July 1947 to 30th June 1948* ; and the *Report for 1965-1966*. The Agreement is referred to briefly in the "historical survey" but not in the section which describes the "status of the Territory". The section on "Finance of the Territory" in the *Report for 1965-1966* (p.15) refers to the Agreement while omitting to provide information on the income generated by the British Phosphate Commissioners (and see also the *Report ... from 1st July 1947 to 30th June 1948*, p.25, para. 48).

D. The Performance of the Trusteeship Council

278. In accordance with Articles 87 and 88 of the United Nations Charter the Trusteeship Council duly exercised its supervisory function in respect of Nauru, and the Territory appears, for the first time, in the *Report of the Council to the General Assembly in respect of the period 6 August 1948 to 22 July 1949* (*General Assembly Official Records*, 4th Sess., Suppl. No. 4 (A/933), 1949). This Report contains "Conclusions and recommendations" which cannot be described as complacent (Part II of the Report).

279. However, this Report, like most of its successors, is relatively unsuccessful in penetrating the factual economic underpinnings of Nauruan affairs. There were two factors at work here. First, a lot of patience is required to penetrate the bland exterior of the legal regime governing the island. Secondly, without the relevant information on the internal operation of the phosphate industry, it was impossible for the Trusteeship Council adequately to measure the progress of the people of Nauru in relation to the standards prescribed by Article 76 of the United Nations Charter.

280. It is unfortunate that the Trusteeship Council did not press harder for the production of the essential information. The first request for information on the operations of the British Phosphate Commissioners, including the accounts, was made during the Fifth Session of the Council (*Report covering its Fourth and Fifth Sessions, 6 August 1948-22 July 1949, General Assembly Official Records*, 4th Sess., Suppl. No. 4 (A/933), p.77). A similar request appears in a Report of the Council ten years later: *Report ... 2 August 1958-6 August 1959, General Assembly Official Records*, 14th Sess., Suppl. No. 4 (A/4100), pp.160-1, para. 67. This position remained unchanged until Nauru became independent, and Australia remained uncooperative.

281. Looking at the Reports of the Trusteeship Council in the light of the facts now available concerning the operations of the British Phosphate Commissioners, the findings of the Trusteeship Council in its Reports are flawed by serious errors of fact induced by the misrepresentations of the Administering Authority, of which the Commissioners were an instrumentality. In these circumstances the Applicant State is entitled respectfully to invite the Court to make an assessment of the legal consequences of the behaviour of the Respondent State in the trusteeship

period with the necessary rigour and in the light of the evidence now available.

E. The Character of the *Status Quo* Inherited in 1947 Inhibited Performance of the Relevant Obligations

282. The attitudes adopted by the Australian Government in the trusteeship period, taken together with the performance of the Trusteeship Council, confirm the continuing effectiveness and dominance of the legal status quo of the Mandate period subsequent to the emplacement of the regime of trusteeship in 1947.

283. In the submission of the Government of Nauru the keeping in place of the status quo of 1919 and the mode in which this regime was applied in practice by the Respondent State inhibited the Government of Australia from the performance of the obligations flowing from Article 76 of the Charter and from the Trusteeship Agreement.

284. The extent of this inhibition can be demonstrated by a summary of the principal elements of the status quo inherited in 1947, as follows:

(a) The principal object of the Respondent State -- to all intents and purposes the exclusive object -- was the exploitation of the phosphate deposits in order to meet the agricultural requirements of Australia, New Zealand and the United Kingdom.

(b) There was a persistent failure to make full and fair reports concerning the economic affairs of Nauru, and the modus operandi of exploitation of what is virtually its only natural resource, to the relevant organs of the United Nations. Since the "quality" of progress in the economic and social spheres, in terms of the legal standards of the trusteeship system, could only be assessed as a relation between income available and results attained, the failure to account had a major role in the failure of the Respondent State to perform its trusteeship obligations.

(c) The result of the Nauru Island Agreement of 1919 and the Lands Ordinance of 1921 (as amended) was a regime in which the system of individual land rights of the Nauruan people was maintained only in form and was subject to the expropriation (without any or any adequate compensation) of the rights to exploit the phosphate. The legal regime overall, and the *de facto* position of the British Phosphate Commissioners, led to a situation in which the entire island and its resources were treated as being effectively at the disposition of the Respondent State.

(d) There was a failure to provide equitable compensation for the exploitation of the phosphate deposits by way of royalty or otherwise. The so-called "royalties" paid over the years were not genuine royalties bargained for on the basis of knowledge of the essential facts, and were wholly out of line with the real market value of the resources concerned: see further Appendix 2.

(e) As a consequence of the extensive delegation of powers to the British Phosphate Commissioners, there was a failure to exercise governmental authority in a mode appropriate to a legal regime of trusteeship.

(f) There was a substantial failure to provide funds for the normal purposes of administration.

285. The section which follows will provide more detailed accounts of these various defaults on the part of the Respondent State, precisely because the situation continued after the installation of the regime of trusteeship.

F. THE SPECIFIC BREACHES OF THE OBLIGATIONS OF TRUSTEESHIP

286. It is intended to present here the evidence of specific violations of the obligations of trusteeship on the part of the Respondent State. Given that these specific violations in virtually every case flow from the system inherited in 1947, the evidence of a pattern of continuing violations in the post-1947 period has the double function of confirming the flawed nature of the status quo inherited in 1947, and also of establishing the existence of continuing violations in the years between 1947 and the time of independence.

287. The principal faults in the legal system installed in Nauru in 1919 certainly involved breaches of the obligations deriving from the Mandate. In the present proceedings the Applicant State does not make any claim in

respect of breaches of the Mandate as such but would emphasize the legal and evidential significance of the events of the Mandate period for the present proceedings.

288. The specific breaches of the obligations of trusteeship will now be treated seriatim.

1. The physical destruction of a major part of the Island of Nauru as a unit of self-determination accompanied by a failure to discharge the responsibility for rehabilitation

289. Between 1919 and the time of independence the British Phosphate Commissioners had by their operations removed the phosphate rock in an area approximately one-third of the surface of the island (see Annexes, vol. 2, Map 2). Only a small proportion of this area was mined out in the period prior to the inauguration of the League Mandate. The physical and environmental effects of the mining have been described in Part II of the Memorial, as well as the exceptional circumstances prevailing on Nauru.

290. In legal terms the key elements are:

(a) the existence on Nauru of an indigenous community living on the island as a unit of self-determination;

(b) the fact that the removal of phosphate rock, or the continued removal of phosphate rock, must necessarily have had the effect of making the island virtually uninhabitable (unless appropriate contingency arrangements were made); and

(c) the legal duty (arising from the existence of the trusteeship) in the particular circumstances of Nauru to provide either rehabilitation as such or the financial means to provide for rehabilitation.

291. The first element involves the position that in 1947 Nauru and its population constituted a unit of self-determination for the purposes of the United Nations Charter generally (see Article 1, para. 2), and for the purposes of the trusteeship system (see Article 76). The fellowship of the trusteeship system and the principle of self-determination is recognised both in the preamble and in the operative part of the General Assembly Resolution 1514 (XV), which contains the Declaration on the Granting of

Independence to Colonial Countries and Peoples and is widely recognised as an aid to the interpretation of the Charter.

292. In due course, the General Assembly gave express recognition of the application of the principle of self-determination to the people of Nauru: see Resolution 2111 (XX), adopted on 21 December 1965; Resolution 2226 (XXI), adopted on 20 December 1966; and Resolution 2347 (XXII), adopted on 19 December 1967.

293. The second element depends upon the exceptional geographical and economic circumstances of Nauru, which have been described in Part II of the Memorial.

294. The third element involves the basic purposes of the trusteeship system. That system would lack substance altogether if its principles were not inimical to the physical destruction of the homeland of the people of a trust territory. The Reports of the Trusteeship Council to the General Assembly had from the beginning of the trusteeship recognised the long-term consequences of the rapid process of exploitation of the phosphate deposits: see *Report of the Trusteeship Council covering its Fourth and Fifth Sessions, 6 August 1948-22 July 1949, General Assembly Official Records*, 4th Sess., Suppl. No. 4 (A/933), p.74; *Report... Covering its First Special Session, its Second Special Session, and its Sixth and Seventh Sessions, 23 July 1949-21 July 1950, General Assembly Official Records*, 5th Sess., Suppl. No. 4 (A/1306), p.134; *Report... covering its Third Special Session and its Eighth and Ninth Sessions, 22 November 1950 to 30 July 1951, General Assembly Official Records*, 6th Sess., Suppl. No. 4 (A/1856), p.226; *Report... covering its Fourth Special Session and its Tenth and Eleventh Sessions, 18 December 1951 to 24 July 1952, General Assembly Official Records*, 7th Sess., Suppl. No. 4 (A/2150), p.259; *Report... Covering the Period from 4 December 1952 to 21 July 1953, General Assembly Official Records*, 8th Sess., Suppl. No. 4 (A/2427), pp.112-13; *Report...covering the period from 22 July 1953 to 16 July 1954, General Assembly Official Records*, 9th Sess., Suppl. No. 4 (A/2680), p.265; *Report... covering the period from 17 July 1954 to 22 July 1955, General Assembly Official Records*, 10th Sess., Suppl. No. 4 (A/2933), p.220; *Report... covering the period from 23 July 1955 to 14 August 1956, General Assembly Official Records*, 11th Sess., Suppl. No. 4 (A/3170), pp.323-5, 333; *Report... covering the period from 15 August 1956 to 12 July 1957, General Assembly Official Records*, 12th Sess., Suppl. No. 4 (A/3595), pp.196, 201; *Report... covering the work of its twenty-first and twenty-second sessions, General Assembly Official*

Records, 13th Sess., Suppl. No. 4 (A/3822), p.94; *Report... 2 August 1958-6 August 1959, General Assembly Official Records*, 14th Sess., Suppl. No. 4 (A/4100), pp.154-55; *Report... 7 August 1959-30 June 1960, General Assembly Official Records*, 15th Sess., Suppl. No. 4 (A/4404), p.149; *Report...1 July 1960-20 July 1962, General Assembly Official Records*, 16th Sess., Suppl. No. 4 (A/4818), p.60; *Report... 20 July 1961-20 July 1962, General Assembly Official Records*, 17th Sess., Suppl. No. 4 (A/5204), pp.31-33; *Report... 20 July 1962-26 June 1963, General Assembly Official Records*, 18th Sess., Suppl. No. 4 (A/5504), pp.22-23.

295. At a certain stage the question of the resettlement of the population was seriously considered and eventually rejected by the Nauruans themselves (see paras. 159-174): but such resettlement, had it occurred, would have been without prejudice to the situation of those who wished to remain on the island. What was envisaged was not a scheme for forcible removal of the population.

296. The only reasonable alternative to resettlement (as a free choice on the part of the population of Nauru) was necessarily the rehabilitation of the worked out phosphate lands. Prior to independence the duty of rehabilitation could have been discharged either by putting the process in hand or by providing the Nauruan inhabitants with the economic means of providing for eventual rehabilitation of worked out phosphate lands as a consequence of their receiving an equitable share of the profits of phosphate mining, or a combination of these. As shown in further detail in Part IV, neither of these courses of action was taken.

297. The duty of rehabilitation has received ample recognition by the United Nations General Assembly. Resolution 2111 (XX) of 1965 "further requests that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (paragraph 4). Resolution 2226 (XXI) of 1966 "recommends further that the Administering Authority should transfer control over the operation of the phosphate industry to the Nauruan people and take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (paragraph 3).

298. By the time of independence no rehabilitation had been undertaken. The history of the Nauruan claim for the costs of rehabilitation is set forth in

Part IV of the Memorial, and for present purposes it is only necessary to indicate the analytical root of the claim. The root of the claim consists in the deliberate and persistent policy on the part of the Administering Authority of not paying genuine royalties at an equitable level, with the consequence that, at the time of independence, Nauru as a community was deprived of the means of undertaking an effective programme of rehabilitation with respect to lands the mining of which had been carried on other than for the benefit of the people of the Territory, who were the legal beneficiaries of the Trusteeship Agreement.

299. The resulting situation has two distinct but related elements:

(a) The failure to pay an equitable share of the phosphate profits to the Nauruan landowners involved a serious breach of the obligations of trusteeship in itself (and see paragraphs 314-319 below);

(b) In view of the failure on the part of the Respondent State to carry out rehabilitation prior to independence, the duty to rehabilitate is transformed into a demand for pecuniary reparation, as the compensating form of reparation for various breaches of the obligations of trusteeship.

300. The category of breaches of the obligations of trusteeship presently under examination includes two other types of conduct, namely, the acceleration of mining prior to independence, and the failure to provide an alternative to practical rehabilitation.

301. The acceleration of phosphate mining on Nauru in the period after 1955 is an episode of considerable evidential significance. Not only was this conduct a breach of the obligations of trusteeship, but the episode reveals with great clarity the motivations and priorities of the Respondent State. These motivations and priorities centred exclusively on the production and supply of very cheap phosphate and not on the interests of the people of Nauru.

302. The motivation for the acceleration of production in 1955 is clear enough from the available documentation. Thus a Confidential Paper dated 12 October 1955 submitted to the Australian Cabinet by Paul Hasluck, the Minister for Territories (Annexes, vol.4 , Annex 63), explained the reasons for the need to accelerate phosphate mining.

303. The most relevant parts of the document are as follows:

"AUSTRALIAN PHOSPHATE SUPPLIES.

1. The vital position of phosphate supplies to the Australian economy was the subject of Cabinet Submission No. 371 of 27th May 1935. Cabinet Decision No. 519 of 20th July 1955 directed that discussions be held with the New Zealand Government, regarding Nauru and Ocean island supplies, with particular regard to the United Kingdom requirements under Article 14 of the Nauru Island Agreement.

2. Since that decision -

   (a) the Christmas Island Phosphate Commission (Australia and New Zealand) has asked for authority to borrow money to increase the output of Christmas Island;

   (b) the British Phosphate Commissioners (Australia, New Zealand and United Kingdom) have reported plans to increase the output of Nauru;

   (c) informal discussions have taken place between Australian and New Zealand officials.

...

4. NAURU AND OCEAN ISLAND

The outputs are -

Nauru	1,200,000 tons
Ocean Island	310,000 tons
	1,510,000 tons

At those rates the life of the deposits would be -- Nauru 55 years, Ocean Island 30 years. The British Phosphate Commissioners wish to increase the output of Nauru to 1,600,000 tons per annum. They would be able to provide the finance for expansion (estimated to cost £1.25 m) from their internal resources and existing bank overdraft limits. Such expansion would, however, reduce the life of Nauru to 40 years therefore the Commissioners have sought the views of the three partner Governme+nts. (Ocean Island is worked with Nauru and, for reasons of economic working, the Commissioners do not propose to increase the output of that Island).

5. The proposal is favoured, notwithstanding the reduction in the life of the deposits for the following reasons:

   (a) The present cantilever and equipment will soon be in need of a thorough overhaul and in preference to shutting down production for six to nine months while the overhaul takes place, the Commissioners propose to erect a second cantilever and equipment which, in addition to providing for continuity of operations during the overhaul, will ultimately relieve the present strain on the existing equipment. The increased production is desired so that the increased capitalisation will not raise the cost of production per ton.

(b) The Island is vulnerable, both strategically and in respect of possible increasing pressure from the United Nations to give other nations a share of the deposits in the future.

(c) The present is a particularly bad time to face a sharp rise in the imported cost of phosphatic rock if it should be decided not to accept the increase in production and the shortening of the life of the deposits.

…

12. RECOMMENDATION

It is recommended that Cabinet approve:

…

(b) That no objection be raised to the British Phosphate Commissioners' plans for increasing phosphate output from Nauru to 1,600,000 tons.

(c) That the United Kingdom be approached with a view to the holding of formal discussions in December 1955, in London, between representatives of the Australian, New Zealand and United Kingdom Governments, and the British Phosphate Commissioners, regarding the partner countries future requirements of Nauru and Ocean Island phosphates.

(d) That the New Zealand Government be invited to share with the Australian Government the costs of investigations by the Department of National Development (as at Annexure 'D') to determine the existence or otherwise of phosphate deposits in Australia, New Zealand and their Territories, and in British Pacific Territories, the amount to be voted each year to be determined by agreement between the two Governments.

(e) That the Ministers for Commerce and Agriculture, National Development and Territories, constitute a committee to deal with questions arising in the course of discussions with

> the United Kingdom Government and the New Zealand Government, on the matters referred to in (c) and (d)."

304. The document makes no single reference to the obligations of the Administering Authority in accordance with the trusteeship system. The same is true of the Confidential Note which was prepared on the basis of the Confidential Paper presented to the Cabinet by Mr Hasluck (Annexes, vol.4, Annex 63).

305. In face of the acceleration of production the United Nations Visiting Mission, reporting in 1956, expressed concern. In the words of the Report:

> "Since the fifth session in 1949 the Trusteeship Council has been concerned with the future of the Nauruan community after the phosphate deposits have been exhausted. Owing to the requirement of the primary industry in Australia and New Zealand, phosphate production in Nauru has been accelerated since 1955. It is now estimated that at the present rate of exploitation the phosphate deposits will come to an end in about fifty years."
>
> (United Nations Visiting Mission to Trust Territories in the Pacific, 1956, *Report on Nauru*, T/1256, 12 June 1956, para. 48.)

306. In face of the information that production had been accelerated, the response of the Trusteeship Council, in successive reports, appears to have been to focus upon the idea of the resettlement of the population and upon Australian undertakings in this connection. The resettlement option (see paras. 159-174), in so far as it remained a practical possibility, reflected the fact that the removal of the phosphate at a greater rate resulted in a dramatically shortened life of the resource. The resettlement option also highlighted the fact that the removal of the phosphate rock had substantial and direct ramifications for the population of Nauru.

307. A further contributing element in the breaches of obligations in the form of the destruction of the island of Nauru, and the failure to discharge the responsibility for rehabilitation, was the failure on the part of the Respondent State to provide an alternative to rehabilitation.

308. In 1948 the Nauruan Community Long Term Investment Trust was established (see the *Report ... on the Administration of the Territory of Nauru from 1st July 1948, to 30th June, 1949*, para. 39). This is described as "a community fund", to which was allotted 2d from the total "royalty" payable on

each ton "for investment until the year 2000". At 30th June 1949 the balance in the fund was £6,530.

309. As early as 1953 the relevant United Nations Visiting Mission referred to the eventual need for resettlement and continued:

> "The Mission is therefore of the opinion that consideration should be given at an early date to the establishment of a capital fund to be used for the resettlement of individuals or groups of the Nauruan Community in accordance with the plan of gradual resettlement which has already been suggested. The Mission feels that the existing Nauruan Long-term Investment Fund may not be sufficient to meet the requirements of such a plan"
>
> (United Nations Visiting Mission to Trust Territories in the Pacific, 1953, *Report on Nauru*, para. 48.)

310. These doubts were apparently shared by the Trusteeship Council. The Council adopted the following recommendation:

> "The Council expresses the hope that full details of the new financial arrangement between the Administering Authority and the British Phosphate Commissioners will be furnished in the next annual report."
>
> (*Report of the Trusteeship Council covering the period from 4 December 1952 to 21 July 1953, General Assembly Official Records*, 8th sess., Suppl. No. 4 (A/2427), p.119.)

311. The response of the Administering Authority appeared in the *Annual Report* for 1953. The reference to the Nauruan Community Long Term Investment Fund is as follows:

> "This fund was created in 1947 by the payment of an additional royalty of 2d per ton which is to be invested on behalf of the Nauruan Community until the year 2000. The rate of this royalty was increased to 5d per ton from the 1st July 1950. The amount standing to the credit of this fund at 30th June 1953 was £80,960."
>
> (Report, p.16.)

312. The scale of this "community fund" was extremely modest in relation to the long-term consequences of the removal of phosphate rock and the substantial inequities of the financial arrangements. The fund was expected to contain three million pounds by the year 2000 (see the *Report of the*

Trusteeship Council covering its Fourth and Fifth Sessions 6 August 1948-22 July 1949, General Assembly Official Records, 4th Sess., Suppl. No. 4 (A/933), p.74). In fact the British Phosphate Commissioners were reported in 1953 to be conferring upon Australia alone a benefit of four to five million pounds per annum (Notes of Meeting of Board of Commissioners with Representatives of Commonwealth Bank, 21 August 1953: Annexes, vol.4, Annex 61, p.6).

313. As a question of economics, the Long-term Investment Fund was inadequate for the purposes of any meaningful programme of rehabilitation or resettlement: see the expert opinion of Mr. Walker (Appendix 2).

2. The failure to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits

314. The failure to provide either for the actual implementation of a rehabilitation programme or for the provision of the costs of such a programme on the part of the Respondent State and the British Phosphate Commissioners, is connected with the failure to report to the United Nations in two ways. In the first place, the failure to rehabilitate provides indirect but highly cogent evidence of the general attitude of the Respondent State and the general tendency to ignore the essence of the obligations attaching to trusteeship. In this aspect the failure to rehabilitate marches alongside the failure to report fully and fairly on the financial aspects of the phosphate operations. These failures form part of a pattern of conduct stemming from the existence of certain goals divorced from concern for the purposes of the trusteeship system and inimical to these purposes.

315. Secondly, the failure to report fully and fairly is an important part of the elements of causation in the case. An Administering Authority which intends to behave in accordance with ordinary standards of fairness and good practice simply does not start out by carefully avoiding any proper accounting to the authorities to whom the relevant duties are owed, and then pursuing this course of conduct for most of fifty years. In other words the failure to rehabilitate or otherwise to provide for the cost of rehabilitation forms an entirely consistent element in the pattern of conduct. In the panoply of prerogatives assumed by the Administering Authority in relation to the phosphate deposits, the failure even to consider taking up the responsibility of rehabilitation would be no more than an ancillary element.

316. In any case the failure to provide full and fair reports constitutes a specific violation of the obligations of trusteeship. Article 3 of the Trusteeship Agreement declares the responsibility of the Administering Authority "to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter".

317. The implementation of those basic objectives must depend upon a full and open disclosure of relevant facts. The failure to make such disclosure necessarily constitutes a substantial violation of the provisions of Article 76 of the Charter as incorporated also in the Trusteeship Agreement.

318. It goes without saying that international obligations must be carried out in accordance with the principle of good faith. This principle is generally recognised as a general principle of law: see Bin Cheng, *The General Principles of Law*, Stevens, London, 1953, pp.106-60. The principle is also expressly declared to be one of the "Principles" binding the United Nations and its Members (Article 2(2) of the United Nations Charter) and forms part of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations adopted, without vote, by the General Assembly on 24 October 1970 (Resolution 2625 (XXV), Annex). The operation of the principle of good faith in the interpretation of treaties has always been recognised (see, for example, A.D. McNair, *Law of Treaties*, Oxford, Clarendon Press, 1961, pp.465, 549) and there is no reason to doubt that the principle applies to obligations having a provenance in instruments other than treaties.

319. It is sometimes pointed out that the principle of good faith has a penumbra of vagueness. That may be so but the core of the principle has clear definition and, as the Court will see from the evidence (summarised below), the conduct of the Respondent State was characterised by a carefully maintained reticence which amounted to an absence of good faith.

3. *The evidence of Australia's reticence in failing to report to the Trusteeship Council on the financial arrangements concerning the mining and disposal of phosphate*

320. It is now necessary to expound the various elements of the evidence which compose the picture of deliberate and persistent refusal on the part of the Respondent State to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits. In approaching the material the Court is respectfully requested to bear in mind that the pattern of conduct commences in the early years when the Nauru Island Agreement of 1919 was implemented: and this pattern remained in all essentials unchanged after the transition from the mandate to the regime of trusteeship.

321. As a preliminary matter it is important to recall the actual subject of the reticence on the part of the Respondent State. The secrecy related to the financial terms on which phosphate was mined in Nauru. The precise mechanism and the system of accounting are analysed in Appendix 2 to this Memorial. The essence of the matter can be expressed as follows:

(a) There was an absence of appropriate accounting to the relevant international organs concerning the exploitation of phosphate on Nauru: in brief, the accounts (in so far as they were made public) were extremely bland and melded the accounts for the three phosphate islands of Nauru, Christmas Island and Ocean Island.

(b) The proportion of the income from phosphate disposed of at artificial prices which was provided to the Nauruans was grossly inadequate in the context of the regime of trusteeship. Further details of the net loss of earnings resulting from the under-pricing of Nauruan Phosphate are provided in Appendix 2.

(c) The inequities of the system revealed by the figures set forth in the previous paragraph were in fact more marked when it is appreciated that the "prices" fixed were unrelated to the prices obtainable in the free market for similar high quality phosphate: thus the "pricing" system was as self-serving, inequitable, and unrelated to the purposes of the trusteeship system, as was the system of the disposal of phosphate as a whole. The question of the real value of Nauruan phosphate in the trusteeship period is analysed by Mr. Walker in Appendix 2.

322. The evidence will now be set forth. When it is analysed it will be seen to fall into a very simple pattern:

(a) The extensive control of the resource granted by the Nauru Island Agreement of 1919 and entrenched by the Lands Ordinance of 1921.

(b) The policies and attitudes of the British Phosphate Commissioners in the application of the provisions of the Agreement of 1919 until the time of independence.

(c) The policies and attitudes of the Respondent State, in particular, in the application of the provisions of the Agreement of 1919, combined with the failure to report fully and fairly to the Trusteeship Council.

G. THE SYSTEM OF THE AGREEMENT OF 1919

323. The system of the Nauru Island Agreement of 1919 was essentially expropriatory and created an economic autocracy operated in the interest of the Governments of Australia, New Zealand and the United Kingdom. Article 6 of the Agreement provided that: "The title to the phosphate deposits on the Island of Nauru...shall be vested in the Commissioners". Article 9 provided that it was "the duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend". Article 10 created a further autocratic dimension: it provided that phosphates could not be supplied to any other country "except with the unanimous consent of the three Commissioners".

324. The background to this Agreement has been explained in paragraphs 265-269. The historical record is clear. The Agreement of 1919 was made on the understanding that Nauru was to be a mandated territory, and the preamble to the Agreement makes this explicit. No doubt the powers of government and control assumed in the tripartite agreement were to be applied compatibly with the purpose of the League of Nations mandate. And yet the form and structure of the arrangements placed a very large measure of governmental discretion and political control in the hands of the

Australian Government and its agents, the British Phosphate Commissioners and the Administrator.

1. The Australian Interpretation of the 1919 Agreement

325. The system created by the provisions of the Agreement of 1919 was reinforced by an extraordinarily artificial interpretation of the provisions by the Respondent State. The essence of this interpretation was that title to the phosphate was vested in the Commissioners and that therefore all questions relating to phosphate and, in particular, royalties were entirely divorced from the duties of the Administering Authority, first under the Mandate and subsequently under the Trusteeship Agreement.

326. This particular legal interpretation appears in a paper obtained from the Australian archives (Annexes, vol.4, Annex 65). The paper is undated but refers to the period of trusteeship. The memorandum includes the following passage (para. 8):

> "A Trusteeship Agreement for Nauru was approved by the Second General Assembly of the United Nations on 1 November 1947 (Hall page 364). The only provision which could relate indirectly to royalties is the obligation of the administering authority under article 5 that in the discharging of its obligations that it will ensure that no rights over native land in favour of any person not an indigenous inhabitant of Nauru may be created or transferred except with the consent of the 'competent public authority'." (emphasis added.)

327. In essence the Australian view was that the Agreement of 1919 had the consequence that the Commissioners and the Governments were accorded plenary powers in respect of the phosphate deposits. That this view had a long pedigree, reaching back at least as far as 1936, is clearly evidenced by the bundle of documents obtained from the Australian Archives and contained in Annexes, vol. 4, Annex 64). In accordance with this legal opinion the validity of the payment of royalties, whether to the administration or to the land owners, was placed in question.

328. The sequence of documents speaks for itself. Opinion No. 111 prepared by the Solicitor General in 1936 (Annexes, vol.4, Annex 55), which is summarised in the document entitled "Opinions Already Expressed" (Annexes, vol.4, Annex 64), drew the following conclusions:

(a) The Commissioners are not liable by agreement to pay royalty to the Administration.

(b) The 1919 agreement does not provide for payment of royalty, and the Administrator cannot make an Ordinance imposing royalty as his powers are "subject to the [1919] agreement".

(c) If the Administration had power to impose a royalty, the result might be that the Administration would accumulate large reserves of money to the prejudice of the rights of the Governments under the 1919 agreement. This is not the intention of the agreement and the Commissioners are not, and cannot be made, liable to pay royalty.

(Opinion No. 111 of 1936; file 36/438.)

329. The issue of the validity of the payment of royalties had remained a live issue within Australian official circles for many years. But in 1965 it emerged into the light and did so at a critical juncture for the Nauruan community. Thus it appears in a paper submitted by the Australian Solicitor-General in response to a submission by the Nauru Local Government Council Delegation on the question of the ownership of the phosphate. The Solicitor-General's paper is dated 7 June 1965. Its context was the negotiations in 1965 between the Nauruan representatives and Australian officials representing the Administering Authority. Thus the paper appears as "Annex J" in the Record of Negotiations prepared in Canberra (Annexes, vol. 3, Annex 2).

330. The Solicitor-General made clear his opinion that the powers of the Administering Authority "in respect of the working of the phosphate deposits" by virtue of the Agreement of 1919 were not constrained in any way, and that the position remained the same in relation to the Trusteeship Agreement (paras. 25-27).

331. The attitude of the Australian delegations engaged in negotiations with the Nauruans in the pre-independence period reflected the position adopted by the Solicitor-General in 1965. The following document confirms this view: see the Record of Negotiations 31st May-10th June, 1965, Annex K. (Annexes, vol. 3, Annex 3).

2. *The Motivation of the Australian Government*

332. The motivation of the Australian Government from the outset of the Mandate and until independence has been the getting and keeping, for as long as politically possible, of cheap supplies of phosphate. This dominant motivation was prefigured in the politics of the Paris Peace Conference of 1919 and the design of a compromise which resulted in Nauru becoming a "Class C" Mandate. As the record shows, Mr Hughes had made strenuous efforts to obtain Nauruan phosphate for Australia preferably by the taking of Nauru as a colony (see paras. 29-39).

333. The Australian interest in cheap phosphate was the predominant purpose in controlling Nauru and this motivation was both powerful and persistent. The Cabinet papers of 1955 show the characteristic attitude of the Australian Government during the trusteeship period. The relevant Confidential Paper dated 12 October 1955 and attached "Notes on Cabinet submission No. 588: Australian Phosphate Supplies" (Annexes, vol. 4, Annex 63) provide authentic evidence of the Australian attitude. In these "Notes" the Recommendation of the Minister for Territories is supported without any reference to the interests of the people of Nauru, and the final paragraph includes these words:

> "A continuing and increasing supply of phosphate is vital to our economy and there is an urgent need for obtaining additional supplies of phosphate at the lowest possible price."

3. *Australian Reporting Practice in the period of the League of Nations*

334. It was natural that the pattern of a lack of frankness in reporting on financial matters should be manifest in the reports to the League of Nations presented by the Administrator. Thus, for example, the Report on the Administration of Nauru during the Year 1922 simply sets aside the affairs of the British Phosphate Commissioners (p.6 of the Report) thus:

> "The functions of the Commissioners, so far as Nauru is concerned, are limited to the business connected with the phosphate deposits. The Administrator alone is charged with the responsibility pertaining to the government, moral and social welfare, labour conditions, etc., of all on the Island – the British Phosphate

> Commissioners being treated, from a Government point of view, as if it were a private company."

335. This statement also appears in the Reports for the years 1923 (p.6), 1924 (p.6), 1925 (p.6), 1926 (p.6). The statement appears, with certain small variations, in the Report of 1927 (p.6). In the Report for 1928 the statement has disappeared.

336. The statement appearing in the Reports prior to that for 1928 is markedly opaque. The Commissioners were not a private company. Their relationship to the governments is explored in more detail in paragraphs 516-541 below. The Commissioners were the generator of massive income which was neither treated as public revenue nor taxed as the profits of a trading company would be. In these circumstances the separation of the responsibilities of the Administrator from the functions of the Commissioners, as indicated in these Reports, is highly artificial.

337. The effect of that separation was to present the phosphate mining operation as something to which the basic mandate and trusteeship obligation did not apply, or as to which that obligation has no purchase, and the Australian Government (as can be seen from the incident of the disallowance of the 1925 Lands Ordinance (see paras. 521-539)) acted throughout as if this were the case.

338. In the later Reports the reference to the role of the British Phosphate Commissioners is more or less restricted to the appearance of an appendix containing the "Report and Accounts of the British Phosphate Commissioners" for the given year. These brief documents reveal very little of the important facts: their eccentricities are analysed by Mr. Walker in Appendix 2 of this Memorial.

4. Australian reporting practice in the period of the United Nations

339. Throughout the period of the trusteeship in Nauru the Australian representative took the lead in refusing to disclose the financial aspects of the phosphate industry operating in Nauru. It became a custom for the Trusteeship Council to include in its reports to the General Assembly a specific request for the production of full information, including the accounts.

Thus in the *Report of the Trusteeship Council covering its Fourth and Fifth Sessions (6 August 1948-22 July 1949)* (*General Assembly Official Records*, 4th Sess., Suppl. No. 4 (A/933) p.77), the Council "requests the Administering Authority to furnish in the next annual report full information on all operations of the British Phosphate Commissioners, including the financial accounts in order to enable the Council to study all aspects of the question of the phosphate industry".

340. An identical request appears in the *Report of the Trusteeship Council covering its First Special Session, its Second Special Session, and its Sixth and Seventh Sessions, 23 July 1949 - 21 July 1950*, *General Assembly Official Records*, 5th Sess., Suppl. No. 4, (A/1306), p.134.

341. At its eighth session, the Council adopted the following conclusion:

> "The Council...reiterates that it remains handicapped in its appraisal of economic conditions because of the absence of information which would show, in particular, the separate financial operations of the British Phosphate Commissioners in respect of Nauru, and the actual prices received for phosphate as compared with world market prices."
>
> (*Report of the Trusteeship Council covering its Third Special Session and its Eighth and Ninth Sessions, 22 November 1950 to 30 July 1951*, *General Assembly Official Records*, 6th Sess., Suppl. No. 4 (A/1856)), p.277.)

342. In the Report for the following period the issue is dealt with in the following passages:

> "At its fifth session, the Council had requested the Administering Authority to furnish in the next annual report full information on all operations of the British Phosphate Commissioners, including the financial accounts.
>
> At its seventh session, the Council had expressed the view that the restoration to full production of the phosphate industry had been of general benefit to the Territory, but had noted that the Council remained handicapped in its appraisal of economic conditions because of the absence of information which would show, in particular, the separate financial operations of the British Phosphate Commissioners in respect of Nauru, and the actual prices received for phosphate as compared with world market prices.
>
> Endeavouring to learn the costs of phosphates landed in Australia and New Zealand from various sources, the Visiting Mission was told by the general manager of the industry that it was unlikely the Commissioners could supply the information requested.

> At its eighth session, the Council had reiterated that it remained handicapped in its appraisal of economic conditions because of the absence of information which would show, in particular, the separate financial operations of the British phosphate Commissioners in respect of Nauru, and the actual prices received for the phosphate as compared with world market prices.
>
> The annual report for 1950-51, like the previous one, contained total export figures for tonnage and value of phosphate, as well as the latest accounts of the British Phosphate Commissioners for Nauru and Ocean Island."
>
> (*Report of the Trusteeship Council covering the Fourth Special Session and its Tenth and Eleventh Sessions*, 18 December 1951 to 24 July 1952. , *General Assembly Official Records*, 7th Sess., Suppl. No. 4 (A/2150), p.260.)

343. At its twelfth session, the Council adopted the following recommendation:

> "The Council, recalling its recommendations made at previous sessions to the effect that the Administering Authority should make available to it the separate financial operations of the British Phosphate Commissioners in respect to Nauru and the actual prices received for the phosphate in comparison with would market prices, urges the Administering Authority to make every effort, in agreement with the British Commissioners, to provide this information in its next annual report".
>
> (*Report of the Trusteeship Council covering the period from 4 December 1952 to 21 July 1953, General Assembly Official Records*, 8th Sess., Suppl. No. 4 (A/2427), p.117.)

344. The Council discussed the same question at its fourteenth session and adopted a substantially similar recommendation. (*Report of the Trusteeship Council covering the period from 22 July 1953 to 16 July 1954, General Assembly Official Records*, 9th Sess., Suppl. No. 4 (A/2680), p.271.)

345. At its sixteenth session, the Council adopted the following recommendation:

> "The Council recalls its previous recommendations to the effect that the Administering Authority should make available to it separate financial accounts in respect of the operations of the British Phosphate Commissioners in Nauru. The Council takes note of the replies to these recommendations given by the Administering Authority indicating the difficulty it perceives in complying with them, and expresses the desire that the Administering Authority in its next and

> subsequent reports will provide the Council with the fullest information feasible on the phosphate operation in the Island".
>
> (*Report of the Trusteeship Council covering the period from 17 July 1954 to 22 July 1955, General Assembly Official Records*, 10th Sess., Suppl. No. 4 (A/2933), p.225.)

346. The Report of the Council for the next period includes the following passages:

> "As indicated above, the Trusteeship Council has made several recommendations to the effect that the Administering Authority should make available to it separate financial accounts in respect of the operations of the British Phosphate Commissioners in Nauru. At its sixteenth session it had taken note of the replies given by the Administering Authority to these recommendations indicating the difficulties which the latter perceived in complying with them, and had expressed the desire that the Administering Authority in its next and subsequent reports would provide the Council with the fullest information feasible on the phosphate operation in the Island.
>
> The information provided in the annual report for 1954-1955 was on the same lines as previously. The Visiting Mission stated that it was unable to obtain any information either on the separate operations of the British Phosphate Commissioners in respect of Nauru or on the actual prices received for the phosphate in comparison with prices received for the phosphate in comparison with prices in other parts of the world. No information was available on the total earnings from the operations on Nauru. The special representative of the Administering Authority informed the Council at its eighteenth session that information complying with Article 5 of the Trusteeship Agreement had been supplied in the annual reports to the Council; however the British Phosphate Commissioners operated not only in Nauru but in other islands not the concern of the Trusteeship Council. It would be impracticable to present completely separate information relating to Nauru phosphates alone. The Administering Authority felt strongly that the Council did not need such information and the disclosure of confidential accounts of the Commissioners in order to perform its task effectively. The information could not disclose any profits -- there were no profits."
>
> (*Report of the Trusteeship Council covering the period from 23 July 1955 to 14 August 1956, General Assembly Official Records*, 11th Sess., Suppl. No. 4 (A/3170), p.335.)

347. That session, the Council adopted the following conclusion and recommendation:

> "The Council recalls its recommendation of the sixteenth session in which it expressed its desire that the Administering Authority, in its next and subsequent reports, would provide the Council with the fullest information feasible on the phosphate operation in Nauru.
>
> The Council takes note of the information submitted in this connexion by the Administering Authority, and expresses the hope that the latter will furnish the fullest possible information in this regard."
>
> (Report of the Trusteeship Council covering the period from 23 July 1955 to 14 August 1956, *General Assembly Official Records*, 11th Sess., Suppl. No. 4 (A/3170), p.335).

348. The next Report of the Trusteeship Council states:

> "84. At its eighteenth session, the Council had noted the information submitted concerning the phosphate operation in Nauru, and expressed the hope that the Administering Authority would furnish the fullest possible information concerning it. In the Report for 1956 the Administering Authority noted the desire of the Council concerning information on the phosphate operation in Nauru.
>
> "85. At its twentieth session, the Council adopted the following recommendations:
>
> > 'The Council, noting that proposals made by Nauru Local Government Council to increase the royalty rates on phosphate are now being considered, noting further that the Administering Authority is currently submitting information on the operations of the British Phosphate Commissioners, considering on the other hand that full information on the operations of the British Phosphate Commissioners as specifically related to the island of Nauru would be of great assistance to the Council for its assessment of the question, recommends that the Administering Authority submit such information to the fullest extent feasible.
> >
> > The Council, noting the statement of the Administering Authority that the British Phosphate Commissioners exert no influence on the budget of the Territory, but nevertheless concerned lest the present system of direct payments by the Commissioners to cover the expenses of the Territorial Administration might lead to the exercise of such influence,

> suggests that the Administering Authority review the present arrangements with a view to removing any such possibility'."
>
> (*Report of the Trusteeship Council covering the period from 15 August 1956 to 12 July 1957, General Assembly Official Records*, 12th Sess., Suppl. No. 4 (A/3595), p.202.)

349. In the Report of the Council covering its twenty-first and twenty-second sessions the issue of information is not stressed: see the Report, *General Assembly Official Records*, 13th Sess., Suppl. No. 4 (A/3822), pp.98-99, paras. 60-62). However, the absence of full and frank information on financial matters continued: see the *Report of the Trusteeship Council, 2 August 1958 - 6 August 1959, General Assembly Official Records*, 14th Sess., Suppl. No. 4 (A/4100), pp.160-1, para. 67.)

350. At its twenty-sixth session the Council adopted the following "conclusions and recommendations":

> "The Council commends the Administering Authority for the increase in the royalty rate paid direct to land-owners.
>
> The Council notes the statement of the Administering Authority that the general review of royalty rates begun last year has reached the stage where the submissions of the British Phosphate Commissioners and of the Nauru Local Government Council are now being examined. The Council requests the Administering Authority to furnish it with appropriate information regarding the views submitted by the two parties in order that it may reach a better understanding of the matter. The Council reiterates the view that any increases resulting from this review should be applied to the Nauruan Community Long-Term Investment Fund.
>
> The Council believing that the information provided to it concerning the operations of the British Phosphate Commissioners in Nauru does not enable it to express a considered opinion on the equitableness of the royalty rates being paid, reiterates its recommendation on this subject adopted at its twenty-fourth session that the Administering Authority provide it with more comprehensive information."
>
> (*Report of the Trusteeship Council, 7 August 1959 - 30 June 1960, General Assembly Official Records*, 15th Sess., Suppl. No. 4 (A/4404), p.155, para. 74.)

351. The relevant passages in the Report of the Council on the work of its twenty-seventh session reveal a growing impatience with the attitude of the Australian government:

'97. The Council at its twenty-sixth session commended the Administering Authority for the increase in the royalty rate paid direct to landowners. It also noted that the general review of royalty rates begun in 1959 had reached the stage where the submissions of the British Phosphate Commissioners and of the Nauru Local Government Council were not being examined. The council requested the Administering Authority to furnish it with appropriate information regarding the views submitted by the two parties, and reiterated its view that any increases resulting from this review should be applied mainly to the Nauruan Community Long-Term Investment Fund. The Administering Authority reported to the Council that the negotiations on royalty rates had been concluded, with the result that the total royalty rate had been increased with effect from 1 July 1960 from 2s.11d. per ton to 3s.7d. per ton. In addition to the above rates, surface payments for land above the eighty feet contour line had been increased from £60 to £120 per acre. It had also been agreed that a four-year period for the new rates be applied in order to give successive Local Government councils the opportunity of reviewing royalty rates.

'98. At the same session, the Council, believing that the information provided to it concerning the operations of the British Phosphate Commissioners in Nauru did not enable it to express a considered opinion on the equitableness of the royalty rates being paid, reiterated its recommendations adopted at its twenty-fourth session that the Administering Authority provide it with more comprehensive information. In the report under review the Administering Authority reiterated its previous observation that information on the operations of the British Phosphate Commissioners would be included in the annual report to the fullest extent possible.

'99. At its twenty-seventh session, the Council adopted the following conclusions and recommendations:

> *The Council, recalling its previous recommendations that the Administering Authority provide it with more comprehensive information concerning the operations of the British Phosphate Commissioners, notes with regret that such information as is contained in the annual report for 1959-60, particularly that on the financial operations of the British Phosphate Commissioners, is not sufficiently comprehensive to enable the Council to determine whether the Nauruan people receive a fair and equitable share of the benefits from the phosphate industry. The Council requests once again that the Administering Authority make every possible effort to include fuller information in its future annual reports, especially regarding the cost of extraction of phosphates and prices obtainable in the world markets.*
>
> *The Council notes with satisfaction the increase in the total royalty rate which came into effect on 1 July 1960 and hopes that negotiations will be conducted*

> *with a view to increasing royalties payable to the Nauruan Community Long-Term Investment Fund."*
>
> (*Report of the Trusteeship Council, 1 July 1960 - 19 July 1961, General Assembly Official Records*, 16th Sess., Suppl. No. 4 (A/4818), p.70.)

352. The Report of the Trusteeship Council for the period 20 July 1961 to 20 July 1962 is of particular significance for present purposes. At last some figures had been supplied (comparative costs of superphosphate fertilizer to consumers in various countries) and this moved the Council to a fairly strong indication of the responsibilities of the Administering Authority. The relevant passages from the Report are as follows:

> "59. The Council has repeatedly recommended that the Administering Authority provide it with more comprehensive information concerning the operations of the British Phosphate Commissioners. At its twenty-seventh session, it noted with regret that such information as was contained in the annual report for 1959-1960, particularly that on the financial operations of the British Phosphate Commissioners, was not sufficiently comprehensive to enable it to determine whether the Nauruan people received a fair and equitable share of the benefits of the phosphate industry. It requested once again that the Administering Authority make every possible effort to include fuller information in its annual reports, especially regarding the cost of extraction of phosphates and price obtainable in the world markets.
>
> 60. The 1962 Visiting Mission reported that the following figures had been supplied by the Administering Authority at the request of the Mission. They show the costs of the superphosphate fertilizer to consumers in various countries in comparison with those in Australia:

New South Wales (Australia)	£12. 9. 0 per ton at point of delivery (on rail at works);
Denmark	£15.12. 4 per ton
Ireland	£15.19. 1 per ton ex works
Finland	£12.10. 0 per ton ex works and/or delivery point
France	£13. 8. 6 per ton ex coastal works
Germany	£16.13. 7 per ton
Israel	£12.10. 0 per ton ex works
Japan	£18. 1. 2 per ton ex nearest rail point
New Zealand	£11. 9.11 per ton
Sweden	£14.18.10 per ton ex works
South Africa	£17. 5. 1 per ton ex coastal factories
United Kingdom	£20.10. 0 per ton ex railway stations (subsidy of £9.1.3 per ton is deductible from this price to arrive at the price paid by the farmers, i.e., £12.8.9)
United States of America	£10. 5. 0 per ton

61. The Mission stated that in 1947 the total contribution made by the British Phosphate Commissioners to Nauruans and to the cost of administration was as follows:

(1) *Tonnage (phosphate exported)*	(2) *Value* £	(3) *Royalties (including royalty for phosphate mined on Administration lands)*		(4) *Administration costs* £	(5) *Percentage of (3) and (4) to (2)*
		Per ton	*Total*		
263,507	527,014	1s.1d.	£14,274	6,588	3.95

62. In 1961, under a new agreement concluded between the Administering Authority, the Commissioners and the Nauruans concerned, the rates were as follows:

Tonnage	*Value* £	*Royalties*		*Administration costs* £	*Percentage*
		Per ton	*Total*		
1,338,681	2,945,098	3s.7d.	£239,847	470,667	24

63. Thus, since the Trusteeship Agreement was concluded, the percentage benefit to the Nauruans against the value of phosphate at the point of export had increased from just 4 per cent to 24 per cent. The Mission considered that those benefits were substantial, and if supplies of phosphate had been inexhaustible it would have been reasonable to allow the questions of royalty and administration costs to be dealt with in the future as in the past by agreement between the Administering Authority, the British Phosphate Commissioners and the elected representatives of the people of Nauru.

64. Since, however, the life of the phosphate operation was limited to some thirty years and since there was no foreseeable replacement of the phosphate income, the Mission was of the opinion that the strongest obligation rested with the Governments of the countries which had benefited from low-price, high-quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the costs of whatever settlement scheme was approved for the future home of the people of Nauru. The scheme

> of resettlement already proposed by the Australian Government would necessitate expenditure of many million pounds. The Mission trusted that whatever additional cost arose from the approval of the specific scheme of a kind proposed by the Mission should also be generously met by the Governments concerned.
>
> 65. At its twenty-ninth session, the Council adopted the following conclusions and recommendations:
>
> > The Council notes with appreciation the information supplied by the Administering Authority to the Visiting Mission regarding the costs of the superphosphate fertilizers to consumers in various countries in comparison with those in Australia. It shares the view of the Visiting Mission that the strongest obligation rests with the Governments of the countries which have benefited from low-price, high-quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the costs of whatever settlement scheme is approved for the future home of the people of Nauru. In this connexion, it takes note with satisfaction of the declaration of the Administering Authority that ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance.
> >
> > Noting from the report of the Visiting Mission that the rate of royalty derived by the Nauruan people from the phosphate has been increasing over the years, the Council takes note of the statement of the special representative of the Administering Authority that the matter of increasing returns from the phosphate operations is a matter for continuing negotiation between the Nauruans, the British Phosphate Commissioners and the Government of the Territory. The Council is confident that as a result of those negotiations, fair and adequate benefits for the Nauruans will be arrived at."
>
> (*Report of the Trusteeship Council 20 July 1961 - 20 July 1962 General Asssembly Official Records*, 17th Sess., Suppl. No.4 (A/5204, pp. 40-41.)

353. In the subsequent Reports of the Council the question of the provision of information disappears: see *Report of the Trusteeship Council 20 July 1962 - 26 June 1963, General Assembly Official Records*, 18th Sess., Suppl. No. 4 (A/5504), pp.27-8, paras. 216-19; *Report.. 27 June 1963-29 June 1964, General Assembly Official Records*, 19th Sess., Suppl. No. 4 (A/5804), pp.29-30, paras. 242-9; *Report... 30 June 1964 - 30 June 1965, General Assembly Official Records*, 20th Sess., Suppl. No. 4 (A/6004), pp.47-50, paras. 402-31; *Report... 1 July 1965 - 26 July 1966, General Assembly Official Records*, 21st

Sess., Suppl. No. 4 (A/6304), pp.41-44, paras. 375-408; *Report... 27 July 1966 - 30 June 1967, General Assembly Official Records*, 22nd Sess., Suppl. No. 4 (A/6704), 45-49, paras. 364-403. On 31 January 1968 Nauru became independent.

354. The reasons for the lack of reference to the refusal of the Administering Authority, as such, and the Australian Government in particular, to produce information about the financial aspects of the phosphate operations, are not far to seek and stand out in the text of the Reports referred to above. By 1962 the issue of resettlement had become a major feature of the agenda and the Australian Government had given a series of undertakings in respect of the costs of such resettlement. Secondly, the British Phosphate Commissioners had agreed to regular meetings with Nauruan representatives (the first to take place in July 1963). Thirdly, by 1965 the negotiations between the Nauruan representatives and the Administering Authority were beginning to be seen as a forum which provided a parallel mechanism, in political terms, to the Trusteeship Council and the General Assembly of the United Nations.

355. The unwillingness on the part of those responsible for the phosphate industry in Nauru to provide information on the mode of exploitation of the island's resources is nowhere more apparent than in the internal Records of the transactions of the British Phosphate Commissioners. The attitude of the Commissioners was that it was not the business of the United Nations to know about the relevant accounts. Thus in a minute of the Commissioners prepared probably in 1946 or 1947 the following appears:

> "Mr. Halligan expressed the view that the Trusteeship Council's request for separate accounts for Nauru would probably be endorsed by the General Assembly, and queried whether the partner Governments would comply.
>
> All Commissioners opposed any suggestion that they should be supplied and held the view that U.N.O. is not entitled to such information, but only to information concerning royalty payments to Nauruans.
>
> In reply to a question as to the effect on the Nauru Agreement of the placing of the Island under the International Trusteeship system, Mr. Halligan said that the chapter of the United Nations Charter dealing with Trusteeship territories contains an article (Article 76(d)) which would give all members of the United Nations equal right of access to Nauru phosphate were it not that Article 80 of the chapter excepts then existing international agreements, of which the Nauru Agreement was one, as overriding any of the provisions of the Trusteeship Charter. Any change of the Nauru Agreement might constitute a new agreement

> which would no longer override the provisions of Article 76(d) of the United Nations Charter."
>
> (Minute No. 683; Annexes, vol.4, Annex 58.)

356. The construction of the Nauru Agreement adopted implicitly in this exchange within the Commission is baseless but the episode confirms the resolution of the Commission not to provide the information which the Trusteeship Council was seeking.

357. In a subsequent Minute under the heading "B.P.C. Accounts", the Commissioners "agreed that pressure for further financial information regarding the operation of the Commissioners at Nauru should be resisted". (Minute No. 823; Annexes, vol.4, Annex 58.)

358. The attitude of the Commissioners and the general character of the financial dealings concerning the phosphate industry is confirmed by an episode of 1953, which is reported fully in a document available in the Public Records Office in London. The document takes the form of "Notes of meeting of Board of Commissioners with representatives of Commonwealth Bank, at Phosphate House, Melbourne, Friday, 21st August 1953". The document is a contemporaneous record: it bears the sub-title "Notes taken by Mr. Enting" and is dated "Melbourne, 25th August 1953". Mr. G.R. Enting was the secretary to the General Manager of the Commissioners, Mr. Harold Gaze and is recorded as such in the preambular list of persons present. The document is set out in the Annexes, vol.4, Annex 61.

359. The purpose of the meeting was to provide the representatives of the Commonwealth Bank with an opportunity to express their misgivings about the progressive growth of the overdraft limits and to seek confirmation of the ultimate responsibility of the so-called "partner Governments" in respect of the debt. The Board of Commissioners were represented by the New Zealand Commissioner, the Australian Commissioner, the General Manager (Mr. Gaze), the Deputy-General Manager, and the Secretary to the General Manager (the author of the Notes of the meeting).

360. In response to certain doubts expressed by the representatives of the Commonwealth Bank as to the long-term financial position of the British Phosphate Commissioners, Mr. Gaze made the following remarks:

> "I do not think there is any possibility of a loss. So far as loss is concerned we are selling phosphate for not much more than a quarter of what it would be elsewhere, and the actual benefit to Australia at the moment is £4,000,000 to £5,000,000 per annum. This not known to anyone not on the inside."
>
> (Notes of meeting, p.6 (emphasis added).)

361. Mr. Gaze, as General Manager from 1920 until 1954, spoke with very considerable authority, and his statement provoked no contradiction or reservation from the two Commissioners present. His knowledge of the affairs of the phosphate industry was second to none, and his role is recorded in detail by M. Williams and B. Macdonald, *The Phosphateers*, Melbourne University Press, Melbourne, 1985 (see, in particular, pp.407-25).

362. This impressive repertoire of evidence establishes that the failure to report on the financial aspects of the production of phosphate on Nauru was the result of a deliberate and consistently maintained policy on the part of the Australian Government and the British Phosphate Commissioners. The evidence indicates that the Australian Government and its partners from time to time held the view that the Nauru Island Agreement of 1919 provided a justification for treating the phosphate industry as lying outside the jurisdiction of the League of Nations and, subsequently, of the Trusteeship Council of the United Nations.

363. Against this background it can be remarked that, if this reliance upon the Nauru Island Agreement of 1919 were indeed justified, there would be no objection to giving publicity to the financial circumstances of the industry. If the pattern of conduct were lawful and above reproach, why such secrecy? If the mode of operation of the industry were above reproach, why the persistent refusal to respond to repeated requests for information by the Trusteeship Council?

H. THE FAILURE TO EXERCISE THE GOVERNMENTAL AUTHORITY APPROPRIATE TO THE OBLIGATIONS OF TRUSTEESHIP

364. From the very first days of the trusteeship the Trusteeship Council and the Visiting Missions expressed disquiet in respect of the system of public finance in Nauru: see the *Report of the Trusteeship Council covering its*

Fourth and Fifth Sessions 6 August 1948 - 22 July 1949, General Assembly Official Records, 4th Sess., Suppl. No. 4 (A/933), p.77.

365. The principal eccentricities of the system of public finance were threefold: the dominance of the phosphate industry and its operations in the life of the island; the independence of the British Phosphate Commissioners in relation to the Administrator; and the fact that the operations of the Commissioners were not subject to taxation. In combination these three factors produced a system of economic autocracy which gave a low priority to the interests of the people of Nauru. Moreover, the system was based on the assumption that the Commissioners had very considerable autonomy and prerogatives. In the submission of the Applicant State the system of government on the island, with particular reference to the availability of revenues for normal public expenditure, involved a failure to exercise the degree and form of governmental authority in Nauru appropriate to the fulfilment of the obligations of trusteeship.

366. The principal elements in this failure were as follows. In the first place, the island and its resources were seen as a mining site and a source of revenue for essentially external -- particularly in the context of the trusteeship system -- agencies, in particular, the Respondent State which was responsible jointly and severally for protecting the interests of the inhabitants as defined in Article 76 of the United Nations Charter.

367. Article 3 of the Trusteeship Agreement provides in clear terms that:

> "The Administering Authority undertakes to administer the territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter."

Moreover, Article 5 of the Agreement provides that:

> "The Administering Authority undertakes that in the discharge of its obligations under Article 3 of this Agreement...
>
> 2. It will
>
> (b) Promote, as may be appropriate in the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants;..."

368. The system of public finance was congruent with the basic idea that the exploitation of the phosphate was the dominant theme both in government and in social affairs on the island. The only source of revenue to cover the normal cost of administration at the outset of trusteeship was the royalty of sixpence on each ton of phosphate exported. In addition a royalty of threepence per ton of phosphate extracted paid to the Nauru Royalty Trust Fund was in practice treated as a budget to cover the expenses of Nauruan education and other social services: see generally the United Nations Visiting Mission to Trust Territories in the Pacific, *Report on Nauru* (1950), *Trusteeship Council Official Records*, 8th Sess., Suppl. No. 3 (T/898), pp.5-6, paras. 35-41.

369. It is a striking fact that the Australian Government was of the opinion that the validity of the royalty paid to the Administrator by the British Phosphate Commissioners was open to question: see the letter from the Prime Minister's office (dated 10 May 1939) to the Secretary of State for Dominion Affairs (Annexes, vol.4, Annex 56); advice of the Crown Solicitor (dated 23 April 1956) in response to a request from the Department of Territories (Annexes, vol.4, Annex 64). Thus the system as conceived made no provision for the collection of revenue. The reason for this was, quite simply, the inference from Article 6 of the Agreement of 1919 to the effect that title in the phosphate deposits was vested in an organ of the Government, the British Phosphate Commissioners, and Governments do not tax themselves.

370. As the Trusteeship Council constantly pointed out, there was a persistent failure to provide a normal system of public finance to cover public expenditures: see the *Report of the Trusteeship Council covering its Fourth and Fifth Sessions 6 August 1948 - 22 July 1949*, *General Assembly Official Records*, 4th Sess., Suppl. No. 4 (A/933), p.77; *Report... covering its First Special Session, its Second Special Session, and its Sixth and Seventh Sessions 23 July 1949 - 21 July 1950*, *General Assembly Official Records*, 5th Sess., Suppl. No. 4 (A/1306), pp.134-5; *Report... covering its Third Special Session and its Eighth and Ninth Sessions 22 November 1950 to 30 July 1951*, *General Assembly Official Records*, 6th Sess., Suppl. No. 4 (A/1856), p.228; *Report... Covering its Fourth Special Session and its Tenth and Eleventh Sessions, 18 December 1951 to 24 July 1952*, *General Assembly Official Records*, 7th Sess., Suppl. No. 4 (A/2150), p.261; *Report... covering the period from 4 December 1952 to 21 July 1953*, *General Assembly Official Records*, 8th Sess., Suppl. No. 4 (A/2427), pp.118-19; *Report...covering the period from 22 July 1953 to 16 July 1954*,

General Assembly Oficial Records, 9th Sess., Suppl. No. 4 (A/2680, pp.271-2; *Report... covering the period from 17 July 1954 to 22 July 1955, General Assembly Official Records*, 10th Sess., Suppl. No. 4 (A/2933), p. 225; *Report... covering the period from 23 July 1955 to 14 August 1956*, General Assembly Oficial Records, 11th Sess., Suppl. No. 4 (A/3170), pp.332-4; *Report... covering the period from 15 August 1956 to 12 July 1957*, General Assembly Oficial Records, 12th Sess., Suppl. No. 4 (A/3595), pp.201-2; *Report... covering the work of its twenty-first and twenty-second sessions*, vol. I, General Assembly Oficial Records, 13th Sess., Suppl. No. 4 (A/3822), pp.98-9; *Report... 2 August 1958 - 6 August 1959*, General Assembly Oficial Records, 14th Sess., Suppl. No. 4 (A/4100), pp.160-1; *Report ... 7 August 1959 - 30 June 1960*, General Assembly Oficial Records, 15th Sess., Suppl. No. 4 (A/4404), pp.154-5; *Report... 1 July 1960 - 19 July 1961*, General Assembly Oficial Records, 16th Sess., Suppl. No. 4 (A/4818), pp.69-70; *Report... 20 July 1961 - 20 July 1962*, General Assembly Oficial Records, 17th Sess., Suppl. No. 4 (A/5204), pp.39-41.

371. The particular preoccupations of the Trusteeship Council were the inadequacy of the benefits derived by the Nauruans from the phosphate industry either directly (royalties) or indirectly (the system of public finance); the inadequacy, in terms of foreseeable long-term needs, of the Nauruan Community Long-Term Investment Fund and the Nauru Royalty Trust Fund (see the *Report... 23 July 1955 to 14 August 1956*, p.334 (Recommendations and Conclusions)); and concern that the system of direct payments by the Commissioners to cover territorial administration expenses might influence the budget of the Territory (see the *Report.. 15 August 1956 to 12 July 1957*, p. 202: Recommendations (para. 85)).

372. By 1962 the issue of public finance had become essentially that of rates of the royalty payments and the progress of negotiations on this subject. At this period, and until the time of independence, the overriding concern was the inequitable nature of the financial arrangements. It was also more readily appreciated by this time that there was no sound reason for segregating the issue of social and economic advancement (and long-term needs) and the question of "public finance".

373. The fact is that up to the time of independence the policy of the Commissioners remained the same: to sell the phosphate "at cost", and to avoid acceptance of a system of taxation. Moreover, the view of the Australian Department of Territories was that it was extremely doubtful

whether the Commissioners had any legal obligation to pay more than the costs of the administration of the Territory (see the *Visiting Mission Report, 1953*, para. 46; Annexes, vol. 4, Annex 8). Overall, the system of public finance, such as it was, was not based upon the long-term needs of the Nauruans. The exceptions to this -- the Nauruan Community Long-Term Investment Fund and the Nauru Royalty Trust Fund -- were small in scale and of marginal significance economically.

I The Failure to promote the Political Advancement of the Inhabitants and their Progressive Development towards Self-government or Independence

374. Article 76 of the United Nations Charter provides that one of the "basic objectives of the trusteeship system... shall be... to promote the political... advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence..." This obligation was incorporated into the provisions of the Trusteeship Agreement for the Territory of Nauru both generally (by virtue of Article 3) and specifically (by virtue of Article 5(2)(c)).

375. The experience of Nauru was essentially one of constitutional and political immobility from the inception of the Mandate in 1919 and persisting through the trusteeship until 1966. In the submission of the Government of Nauru, the failure of the Administering Authority, and, in particular, of the Australian Government, to make provision for the long-term needs of the people of Nauru bears a close relation to the lack of political development.

376. This relation had two aspects. First, the absence of political advancement was a natural concomitant and result of the narrow economic motivation of the Administering Authority and of policies based upon an obviously self-serving interpretation of the provisions of the Agreement of 1919. Secondly, the Nauruan community was significantly the less able to express its wishes and to seek to impose constraints upon the policies of the Respondent State.

377. There is thus an intimate connection between the lack of political advancement and the extreme slowness of the Respondent State to face up to the long-term consequences of the phosphate mining and the responsibilities which these consequences generated within the trusteeship system. This connection deserves to be stressed. However, given that the Applicant State

is concerned primarily with the consequences of the phosphate mining and the question of rehabilitation, it will not be necessary to do more than to indicate the essential elements in the pattern of conduct constituting a failure to promote the political advancement of the inhabitants of the Trust Territory and their progressive development toward self-government or independence.

378. As a preliminary to an examination of the facts, certain highly relevant background factors must be indicated. First, the level of literacy in the population of Nauru (as a result of the influence of mission schools) was high during the material period. Secondly, the island has no history of political instability, or foreign subversion of minority groups. Thirdly, in view of the radical significance, for the future of Nauru as a homeland, of the substantial programme of phosphate mining, the duty of the Respondent State to bring the population into the political and economic picture would, according to any ordinary standards of law and morals, be more, rather than less, onerous.

379. Indeed, in this context it can be appreciated that the option of resettlement was placed before the Nauruan community at a stage when they were still being denied the right to seek independent expertise or any adequate basis for weighing the legal issues and the options available. Finally, it is obvious that the eccentric system of government and public finance prevailing both under the Mandate and in the trusteeship period was essentially inimical to the concept of public accountability and representative democracy.

380. The principal facts can be presented with reasonable economy. Shortly before independence, and when it was clear that that event was not far off, provision was made (in the Nauru Act 1965 (Cth)) for a Legislative Council to consist of nine elected members, the Administrator as President, and five persons appointed by the Governor-General of Australia on the nomination of the Administrator: see Commonwealth of Australia, Territory of Nauru, *Report for 1965-1966*, Canberra, 1966, pp.6-7. The first general election of members of the Legislative Council was held on 22nd January 1966. The Council could make ordinances for the peace, order and good government of the Territory, but, even at this stage, it was not permitted to make ordinances concerning the phosphate industry, phosphate royalties, and the ownership and control of phosphate-bearing land.

381. The establishment of the Legislative Council was no doubt a serious form of political advancement, but this development appeared some eighteen years after the beginning of the trusteeship, and the powers conferred still did not extend to the phosphate industry. Thus the general political immobility which had prevailed since 1947 -- and, in fact, since 1919 -- continued to apply in respect of the phosphate industry until the time of independence.

382. The contents of the Nauru Act of 1965 (Cth) provide important confirmation of the synthesis between the formal constitutional arrangements within the island and the economic autocracy and lack of accountability which characterised the operations of the British Phosphate Commissioners. Just as, historically, the Administrator had played second fiddle to the Commissioners, so the Nauruan community was left out of the orchestra altogether until 1966, and then allowed in only for a limited repertoire.

383. The history of political immobility consists of the central fact that for nearly all of the material period the Nauruans had been allowed a purely advisory role. This was the role of the Nauruan Council of Chiefs (formed in 1927) and this was also the role of the Nauru Local Government Council constituted in 1951 and composed of nine members elected by adult suffrage and secret ballot from the district constituencies. The new body had no functions additional to those transferred to it from the former Council of Chiefs.

384. As far as it went, the machinery worked well and demonstrated, if this were necessary, that the Nauruan people were fully attuned to the democratic process. However, consistently with the dominant pattern of government on the island, the powers of the Council, advisory though they were, did not extend to the operations of the phosphate industry, and this reservation of powers relating to the phosphate industry survived the political changes brought about by the Nauru Act 1965 (Cth) and remained until the achievement of independence.

385. The picture described in the previous paragraphs is amply confirmed by the successive Reports of the United Nations Visiting Missions during the trusteeship: see United Nations Visiting Mission to Trust Territories in the Pacific, *Report on Nauru* (1950), *Trusteeship Council Official Records*, 8th Sess., Suppl. No. 3 (T/898), pp.2-4, paras. 14-30; United Nations Visiting Mission to Trust Territories in the Pacific, *Report on Nauru* (1953),

Trusteeship Council Official Records, 12th Sess., Suppl. No. 2, pp.3-4, paras. 15-31; United Nations Visiting Mission to Trust Territories in the Pacific, *Report on Nauru* (1956), *Trusteeship Council Official Records*, (T/1256), paras. 22-47; United Nations Visiting Mission to the Trust Territories of Nauru, New Guinea and the Pacific Islands, *Report on Nauru* (1959), *Trusteeship Council Official Records*, 24th Sess., Suppl. No. 4, pp.4-8, paras. 25-49 (it may be noted that this chapter is headed "economic advancement" in error); United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, *Report on Nauru* (1962), *Trusteeship Council Official Records*, 29th Sess., Suppl. No. 2, pp.2 (paras 7-12), 5-6 (paras. 36-55), 9-10 (paras. 84-95); United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, *Report on Nauru* (1965), *Trusteeship Council Official Records*, 32nd Sess., Suppl. No. 2, pp.3 (paras. 13-19), 7 (paras. 43-5), 10-11 (paras. 92-8).

386. Relevant material can also be found in the Reports of the Trusteeship Council to the General Assembly and in the Annual Reports on the Administration of Nauru to the Trusteeship Council.

387. The overall picture of political immobility needs to be supplemented by reference to the small extent of Nauruan participation in the senior posts of the administration, a feature which persisted until the period of independence and which was the subject of adverse comment by several Visiting Missions: see United Nations Visiting Mission to Trust Territories in the Pacific, *Report on Nauru* (1956), *Trusteeship Council Official Records*, paras. 41-47; United Nations Visiting Mission to the Trust Territories of the Pacific, *Report on Nauru* (1959), *Trusteeship Council Official Records*, 24th Sess., Suppl. No. 4, p. 8 (paras. 47-49); United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, *Report on Nauru* (1962), *Trusteeship Council Official Records*,, Suppl. No. 2, pp.9-10, paras. 85-86.

388. The abiding source of difficulty and the central problem in the context of political advancement remained the absence of any Nauruan participation in the control, management, and future planning of the phosphate industry.

J. THE FAILURE TO PROMOTE THE ECONOMIC, SOCIAL, EDUCATIONAL AND CULTURAL ADVANCEMENT OF THE INHABITANTS

389. Article 76 of the United Nations Charter provides that one of the "basic objectives" of the trusteeship system "shall be ... to promote the political, economic, social and educational advancement of the inhabitants of the trust territories..." This obligation was incorporated into the provisions of the Trusteeship Agreement for the Territory of Nauru both generally (by virtue of Article 3) and specifically (by virtue of Article 5(2)(b)). It is noteworthy that whilst Article 76 of the Charter brings the different forms of advancement together in an omnibus formulation, Article 5(2)(b) separates the other forms from "political advancement" and, incidentally, includes "cultural advancement".

390. The submission of the Government of Nauru is that, particularly in the circumstances of the island and the realities of the phosphate industry prior to independence, there was a total failure to promote the economic advancement of the inhabitants in relation to the resources available. The evidence, presented in the earlier sections of this Part of the Memorial, shows that the three Governments simply had no intention to effect the economic advancement of the inhabitants, and that their clearly articulated policies had an exclusive object: the economic advancement of the agricultural sectors of the economies of the three partner states.

391. Of course, the inhabitants received "royalties" in various forms, but these payments were well below an equitable standard and were in reality simply a minimal form of "compensation" for the expropriation of a major natural resource. The "royalties" could not in this context count as a form of "economic advancement".

392. In the case of the other forms of advancement -- "social, educational and cultural" -- the failure is relative to the failure to promote political and economic advancement. Schools were built, and health and other services were provided. It is not the intention of the Government of Nauru to belittle the positive steps which were taken and the work of individual officials in this regard. The salient point is that what was done was inadequate in relation to the relevant standard of legal entitlement.

393. This standard logically depended upon the availability of resources and the standard of fairness in these matters. The resources were there, but as a result of a deliberate policy they were not made available, and consequently the advances made, for example, in education, were not related to the legal entitlement of the Nauruan community to access to the financial benefits of the phosphate industry. Political and economic advancement would have provided access to those benefits and a proportionate increase in expenditure on education and other services.

K. The Failure to Respect the Land Rights of the Indigenous Inhabitants

394. Article 5(2)(a) of the Trusteeship Agreement involved the undertaking by the Administering Authority that

> "it will, in accordance with its established policy: (a) Take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory; and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant of Nauru may be created or transferred except with the consent of the competent public authority..."

395. This provision was introduced in the first part of Article 5 as an aspect of the discharge by the Administering Authority of its obligations under Article 3 of the Agreement, which referred to "the basic objectives of the International Trusteeship System", set forth in Article 76 of the United Nations Charter.

396. In the submission of the Government of Nauru, the legal regime established at the outset of the League of Nations Mandate, and which endured until the independence of Nauru, involved substantial and persistent breaches of the obligations contained in Article 76 of the United Nations Charter and elaborated in Article 5 of the Trusteeship Agreement.

397. These breaches were of two kinds. The first consisted of the institution, in the Lands Ordinance of 1921, of a legal regime which was fundamentally opposed to the giving of an appropriate degree of respect to the land rights of the indigenous inhabitants. The eccentricities of this regime are elaborated in Part I Chapter 1 of this Memorial (see paras. 80-100) and the Court is respectfully requested to refer to that exposition. The

essence of the matter is that the interest of the individual landowner was placed at the disposal of the British Phosphate Commissioners subject to the payment of "royalties" which were not the result of a process of genuine negotiation "at arm's length" and which were in any case unrelated to the real value of the resources being disposed of.

398. The extent of the powers granted to the British Phosphate Commissioners both in law and in fact is illustrated by the episode of the exclusion of the inhabitants of the Aiwo district on the return of the administration at the end of the war. The documents available show that the attitude of the British Phosphate Commissioners and of the Administration was that the interests of the inhabitants was secondary to the prerogative of the Phosphate Commissioners (in the view of the Administrator) to take all the land it wanted in the Aiwo district for their purposes (Annexes, vol.4, Annex 59).

399. The second type of breach of the pertinent legal obligations involved the failure to return worked out phosphate areas to the landowners without undue delay and the absence of any adequate procedures for dealing with complaints arising from the unjustified retention of land by the British Phosphate Commissioners.

400. As late as 1959, a Visiting Mission had to suggest that the justiciability of landownership questions should be examined: United Nations Visiting Mission to the Trust Territories of Nauru, New Guinea and the Pacific Islands, *Report on Nauru* (1959), *Trusteeship Council Official Records*, 24th Sess., Suppl. No. 4, p.10, para. 60.

PART III

CHAPTER 3

BREACH OF INTERNATIONAL STANDARDS APPLICABLE IN THE ADMINISTRATION OF THE TRUSTEESHIP

Section 1. Introduction

401. During the currency of the trusteeship regime in the Territory of Nauru, from 1947 until 1968, the obligations of the Australian Government and its associates were supplemented by the legal principle of the self-determination of peoples and its congener, the right of peoples and nations to permanent sovereignty over their natural wealth and resources. The principle of equal rights and self-determination of peoples has always been a part of the law of the United Nations Charter and has thus inevitably co-existed with the legal regime of trusteeship. The principle of permanent sovereignty -- in essence, a logical corollary of the principle of self-determination -- was soon to become an emergent principle of general international law.

402. It is generally accepted that an instrument of international law must be interpreted against the background of the general principles of international law: see A.D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp.466-7; Fitzmaurice, *British Year Book of International Law*, vol. 30 (1953), p. 5; ibid., vol. 33 (1956), pp.225-7; Hersch Lauterpacht, *The Development of International Law by the International Court*, London, 1958, pp.27-28; Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963, pp.92-6.

403. This principle must have greater cogency when the instrument to be applied or construed is itself a formulation of general international law, which is true in the case of the regime of trusteeship enshrined in Article 76 of the United Nations Charter and the various trusteeship agreements.

404. Two other preliminary matters may be considered. In the first place, opponents of the principle of self-determination tend to emphasise the

difficulties encountered in identifying a unit of self-determination. This issue can be dealt with briefly in the present context. Like most concepts, the application of the principle of self-determination to certain sets of facts may reveal a penumbra of doubt, but such problems have no place in the present proceedings. For there can be no doubt about the capacity of the indigenous inhabitants of Nauru as a unit of self-determination and also as beneficiaries of the principle. This capacity is recognised in the provisions of the Trusteeship Agreement for the Territory of Nauru.

405. It has also received explicit and formal recognition in the series of General Assembly resolutions which preceded the independence of Nauru: see Resolution 2111 (XX), adopted on 21 December 1965 (roll-call vote of 84 to 0, with 25 abstentions) (Annexes, vol. 4, Annex 15); Resolution 2226 (XXI), adopted on 20 December 1966 (recorded vote of 85 to 2, with 27 abstentions) (Annexes, vol. 4, Annex 16); and Resolution 2347 (XXII), adopted unanimously on 19 December 1967 (Annexes, vol. 4, Annex 17).

406. Secondly, whilst there is some debate concerning the precise ambit of the phrase "national wealth and resources", there can be no doubt that the phosphate deposits form part of and, indeed, for all practical purposes, have constituted the national wealth and resources of the people of Nauru at all material times.

Section 2. Breach of the Principle of Self-Determination

407. The principle of self-determination has been confirmed by the subsequent practice of the members of the United Nations as a part of the law of the Charter. This practice included the Declaration on the Granting of Independence for Colonial Countries and Peoples contained in Resolution 1514 (XV) adopted on 14 December 1960. This Resolution represents an authoritative interpretation of the Charter and its significance has been widely acknowledged. The fifth paragraph of the Declaration provides as follows:

> "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom".

408. Moreover, the common first Articles of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant and Civil and Political Rights, adopted by the General Assembly on 16 December 1966, provide (paragraph 1) that: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

409. The status of the principle of self-determination as a principle of the United Nations Charter was further enhanced by its inclusion in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations adopted by the General Assembly on 24 October 1970 (Resolution 2625 (XXV)). The first paragraph of the relevant section of the Declaration of 1970 stipulates as follows:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

410. In any event the Court has recognised that the principle of self-determination forms a part of the law of the Charter and of general international law: see the *Namibia Advisory Opinion*, I.C.J. Reports, 1971, pp.31-2; and the *Western Sahara Advisory Opinion*, I.C.J. Reports, 1975, pp.31-33. It is significant that in the relevant passage in the *Namibia Opinion*, the Court expressly refers to the regimes of mandated and trust territories in the context of self-determination (ibid., p. 31, para 52).

411. The legal status of the principle of self-determination is generally recognised and the following citations provide an appropriate sampling of the doctrine: Judge Bedjaoui, *Recueil des Cours*, Hague Academy, vol. 130 (1970, II), p.493; Professor Jiménez de Aréchaga, Recueil des Cours, Hague Academy, vol. 159 (1978, I), pp.33-4, 100-11; Judge Lachs, *Recueil des Cours*, Hague Academy, vol. 169 (1980, IV), pp.43-54; Judge Elias, *New Horizons in International Law*, Alphen aan den Rijn, 1980, pp.8-9, 33, 95; Judge Mosler (as he then was), *The International Society as a Legal Community*, Alphen aan den Rijn, 1980, pp.26, 90; Pastor Ridruejo, *Curso de Derecho Internacional Publico*, 2nd ed., Madrid, 1987, pp.248-56.

412. The status of self-determination as an original principle of the Charter has sometimes been doubted. However, Articles 73 and 76 of the Charter apply the essence of the principle respectively to the categories of non-self-governing territories and territories placed under the international trusteeship system. As a consequence of the designation of Nauru as a territory subject to trusteeship, the principle was expressly recognised to be applicable to the affairs of the people of Nauru.

413. In the submission of the Applicant State the policies applied by the Respondent State during the trusteeship period in relation to the phosphate industry inevitably involved substantial breaches of the principle of self-determination. The economic and political circumstances involved the literal disposal of the territorial foundation of the unit of self-determination accompanied by a failure to provide an adequate sinking fund to cover the costs of rehabilitating the worked out phosphate lands. It is difficult to conceive of a more serious breach of the principle of self-determination. Moreover, the breach was compounded by a refusal to provide relevant economic data either to the Nauruans or to the Trusteeship Council of the United Nations.

414. The link between the implementation of self-determination and habitability is obvious enough, and it is stressed in the two General Assembly Resolutions which preceded the final achievement of independence. Thus Resolution 2111 (XX), adopted on 21 December 1965, "further requests that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (paragraph 4). Similarly, in Resolution 2226 (XX1), adopted on 20 December 1966, the General Assembly "recommends further that the Administering Authority should transfer control over the operation of the phosphate industry to the Nauruan people and take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (paragraph 3). In the preambular part of General Assembly Resolution 2347 (XXII) concerning the termination of the Trusteeship Agreement these two previous resolutions are recalled.

Section 3. Breach of the Principle of Permanent Sovereignty over Natural Wealth and Resources

415. The principle of permanent sovereignty over natural resources is a logical corollary of the principle of self-determination and has developed as such in the work of the United Nations. Thus the common Article 1, paragraph 2, of the two International Covenants on Human Rights adopted by the General Assembly in 1966, provides as follows:

> "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

416. It is significant that this formulation was adopted in the relevant draft article by the Third Committee of the General Assembly in 1955. The status of the provision is enhanced by the provisions of Article 25 of the International Covenant on Economic, Social and Cultural Rights:

> "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

417. On 14 December 1962 the General Assembly adopted Resolution 1803 (XVII) which contained a Declaration on Permanent Sovereignty over Natural Resources of which the first paragraph provided as follows:

> "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest and well-being of the people of the state concerned."

Paragraph 7 provides further that:

> "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace."

The law-making significance of this Declaration of 1962 is widely accepted: see Judge Bedjaoui, *Recueil des Cours*, vol. 130 (1970, II), pp.495-6; Lachs, *Recueil des Cours*, vol. 169 (1980, IV), pp.55-59; Higgins, *Recueil des Cours*, vol. 176 (1982, III), 287-9; Schachter, *Recueil des Cours*, vol. 178 (1982, V), pp.296-301; Hossain and Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law*, London, Francis Pinter, 1984, pp.1-39; Broms, in Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 10 (1987), 306-10; and the United Kingdom Note to Iraq, 4 September 1967, *British Practice in International Law*, British Institute of International and Comparative Law, 1967, p.121.[1]

418. Further affirmation of the legal status of the right of peoples and nations to permanent sovereignty over their natural wealth and resources may be found in Decree No. 1 of the United Nations Council for Namibia adopted on 27 September 1974 and approved by the General Assembly on 13 December 1974 (Annexes, vol.4, Annex 21); the Vienna Convention on Succession of States in respect of Treaties, opened for signature on 23 August 1978, Article 13; and the Final Act of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts, 7 April 1983, Resolution Concerning Peoples Struggling Against Colonialism, etc., paragraph 2 (Annexes, vol. 4, Annex 22).

419. The facts of the present case reveal a particularly grave series of breaches of the principle of permanent sovereignty in circumstances in which not only was a major resource being depleted on grossly inequitable terms but the extraction of the resource necessarily involved the physical reduction of the homeland of the people of Nauru. The evidence reveals that the Australian Cabinet was taking its decision to accelerate the mining of the phosphate deposits in 1955, precisely at a time when the principle of permanent sovereignty was in the process of recognition as a corollary of the long-established principle of self-determination.

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[1] However, arbitral tribunals have adopted different views on the precise legal consequences of Resolution 1803: see the *Texaco Award*, 53 I.L.R. 389, paras. 68, 80-1, 83-4, 87-8; the *LIAMCO Award*, 20 I.L.M. (1981) p.1 at pp.99-103; and the *Aminoil Award*, 66 I.L.R. 519 at pp.587-8, 601-2.

Section 4. The Status of the Relevant Principles as Jus Cogens

420. On behalf of the Applicant State it is submitted that both the principle of self-determination and the principle of permanent sovereignty of nations and peoples over their natural wealth and resources have the status of peremptory norms (*jus cogens*). In the alternative, it is submitted that the relevant principles have that status as a result of their functional association with the fundamental principles of the international trusteeship system, which principles have the status of peremptory norms (see paras. 253-261).

421. On this basis -- as already stated in paragraph 241 above -- the Government of Nauru reserves its position on the question of the validity of the Nauru Island Agreement of 1919. This reservation is particularly necessary in view of the provisions of Article 64 of the Vienna Convention on the Law of Treaties:

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

Section 5. The Interpretation of the United Nations Charter and the Trusteeship Agreement: An Alternative Approach

422. The position of the Applicant State is that the principle of self-determination of peoples has formed a part of the law of the United Nations Charter from the outset and, further, that Article 76 of the Charter and the various trusteeship agreements are formulations of a regime of general international law. At the same time the Government of Nauru considers it necessary to draw the attention of the Court to an alternative position.

423. This alternative approach involves an acceptance of the possibility that the principle of self-determination crystallised as a legal principle subsequently to the constitution of the international trusteeship regime. The appropriate mode of interpretation, it is respectfully submitted, would be that adopted by the Court in two striking passages to be found respectively in the Advisory Opinion in the *Namibia case* and the Judgment in the *Aegean Sea* case.

424. In the Advisory Opinion the Court stated the following principle of interpretation:

> "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant -- 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned -- were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law."
>
> (I.C.J. Reports, 1971, p.31, para. 53.)

425. The principle expressed in the final sentence of this passage is clearly applicable to any changes in the law which may have occurred subsequently to the adoption of the United Nations Charter.

426. The same mode of interpretation of standard-setting instruments of continuing duration was adopted by the Court in the *Aegean Sea* case:

> "While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law."
>
> (I.C.J. Reports, 1978, p.32, para. 79.)

427. It would appear that this logic applies *a fortiori* to standard-setting instruments involving human rights and the equality of peoples. The criteria of performance of the duties of trusteeship specified in general terms in Article 76 of the Charter call for decision-making which takes account of developments in moral, social, and legal values.

428. It may be recalled that the European Court of Human Rights has found it necessary to apply a similar approach to interpretation and application of the European Convention on Human Rights. Thus in the *Tyrer Case*, the Court observed: "In the case before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (Publications of the European Court of Human Rights, Series A, No. 26, para. 31).

429. In any event, and taking the most conservative view of the matter, the principles of self-determination and of permanent sovereignty over natural resources constitute objective international standards providing aids to the interpretation of the Trusteeship Agreement and the relevant provisions of the United Nations Charter (see the Dissenting Opinion of Judge Jessup, *South-West Africa Cases (Second Phase)*, I.C.J. Reports, 1966, p.6 at pp.432-433).

PART III

CHAPTER 4

DENIAL OF JUSTICE LATO SENSU

430. In its Application in the present case (paragraph 46) the Government of Nauru claims "that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967, and having regard to the terms and conditions on which Australia allowed those lands to be exploited, engaged in a denial of justice in the broad sense (denial of justice lato sensu) with respect to the Nauruan people".

431. The concept of denial of justice in the broad sense is a familiar aspect of the law of State responsibility and is commonly applied in the context of the treatment of aliens and their property by host States. The Court will recall that the concept is applicable to the conduct of both judicial and non-judicial organs: see, for example, M.M. Whiteman, *Digest of International Law*, vol. 8, Washington, 1967, pp.726-7; Fitzmaurice, *British Year Book of International Law*, vol. 32 (1955-6), p.81, fn. 3 (also reprinted in Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, Grotius, 1986, I, p.321, fn.3).

432. The essence of denial of justice is the incidence of gross and manifest error in the application of the relevant legal standards, often associated with a policy of arbitrariness or discrimination, and, indeed, caused by the operation of such a policy. This cause of action appeared in the final submissions of the Belgian Government in the *Barcelona Traction Case (Second Phase)*, I.C.J. Reports, 1970, p.4, at pp.18-22.

433. In relation to the specific allegations of fact concerning the bankruptcy proceedings in Spain culminating in the sale of the property in question to a private Spanish group, the Belgian Government formulated the following submission:

> "Considering that a large number of decisions of the Spanish Courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice lato sensu."

434. This proposition, it is respectfully submitted, is readily applicable, mutatis mutandis, to the policies, decision-making procedures, and specific transactions, of the Australian Government and the British Phosphate Commission, in relation to the obligations of the legal regime constituted by Article 76 of the United Nations Charter in conjunction with the Trusteeship Agreement for the Territory of Nauru.

435. The formulation of the Belgian Government reported above, has not been the subject of adverse comment from professional opinion, and the concept of denial of justice is not a priori restricted to the relations of foreign investors and host States. The concept is no less appropriate to the relations of a host community (the indigenous inhabitants of a Trust Territory) and any external actor to whom the powers of government have been delegated such as an Administering Authority.

436. The analogy is the more compelling when the foreign agency consists in significant part of an economic enterprise (the British Phosphate Commissioners). It can surely make no legal difference that the enterprise is public rather than private or that the risk-taking associated with enterprise and investment was completely absent.

437. In the submission of the Government of Nauru what matters for legal purposes is the existence of a framework of legal duties and relationships and a situation in which the legal security of one side is determined by the organs and procedures of the other side, in this case, the Respondent State. The framework of duties and relationships in the present context is set by the Trusteeship Agreement and, given the objectives set forth in Article 76 of the Charter, the concept of denial of justice is particularly appropriate.

438. In the context of the policies and decision-making procedures adopted by the Respondent State in the material period, the denial of justice was manifested in several ways. The system of leases of phosphate bearing lands involved substantial errors of law as to the correct mode of resolving the tension between the objectives of the Nauru Island Agreement of 1919 and the Trusteeship Agreement. Whatever the correct view of the legal interest which the British Phosphate Commissioners had in the phosphate deposits,

the modalities adopted in the Lands Ordinances of 1921 and 1927 enacted by the Australian Administrator could not be legally justified.

439. The rights of the landowner as such were subjected to a form of conditional expropriation. The "leases" were not negotiated but imposed. The "royalty" was not a result of a contractual bargain but was a lump sum fixed by statute. The (limited) protection of landowners' interests in the future amenity of worked-out lands, previously applicable under German law, was simply repealed and not replaced: see paras. 16, 22-27.

440. It is a striking fact that the so-called "royalty" was paid not as of right but as of concession: see the legal opinion of the Australian Government on the application of Nauru Island Agreement of 1919 (para. 62). The Australian view, which was maintained until the time of Nauruan independence, was that because the British Phosphate Commissioners had title to the phosphate, therefore no royalty was payable. Even if this assumption were correct (which is not admitted), the conclusion is impossible to justify, since a right to exploit the phosphate did not involve a right to expropriate the rights of the landowners as such.

441. Indeed the 1919 Agreement itself clearly allowed for royalties to be paid. The failure to pay adequate royalties flowed not from the terms of the Agreement as such, but from the refusal of the British Phosphate Commissioners to pay such royalties, and from the failure of the Respondent State to insist on them. (See also paras. 504-515.)

442. In the outcome, the "royalty" paid was not a royalty in fact, and the scale of payment bore no relation to the normal standard of compensation for expropriated property.

443. All these elements combined to present a compound denial of justice. There is yet a further dimension to the conduct of the Respondent State. The Lands Ordinances provide no machinery by which the landowner could challenge the procedure of the taking of phosphate lands by means of compulsory "leases". No procedure was available to test either the compatibility of the Lands Ordinances with the relevant international standards or the adequacy of the "compensation" provided for the interference with the rights of the landowner.

PART III

CHAPTER 5

ABUSE OF RIGHTS AND ACTS OF MALADMINISTRATION

444. There are certain cases in which the "causes of action" -- the legal bases of the claim -- emerge more or less spontaneously from the evidence, whilst in other cases the bases of claim, valid though they may be, are very much legal constructions erected over the facts. The present case is a striking example of the former class of case. The conduct of the Respondent State constitutes a perfect paradigm of abuse of rights in the form of acts of maladministration within the context of the powers conferred upon the Administering Authority in accordance with Article 76 of the United Nations Charter and the Trusteeship Agreement for the Territory of Nauru.

445. The principle of abuse of rights has been recognised by the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*, (1926) P.C.I.J., Ser. A., No. 7. This decision related to a situation closely analogous to the role of the Australian Government and its partners in Nauru. The Court found that Germany retained certain powers in Upper Silesia in the period between the coming into force of the Peace Treaty and the transfer of sovereignty. In the words of the Permanent Court:

> "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement."
>
> (P.C.I.J., Ser. A., No. 7, p.30.)

446. Similar references, also in the context of the exercise of certain powers of government in a particular territory, appear in the two Judgments of the Permanent Court in the *Free Zones Case*: see P.C.I.J., Ser. A., No. 24 (1930), p.12; and Ser. A/B, No. 46 (1932), p.167.

447. In the submission of the Applicant State, abuse of rights is a general principle of law and thus a general principle of international law. This submission is reflected in the authoritative opinions of publicists of various nationalities: see, for example, Sir Gerald Fitzmaurice, *British Year Book of International Law*, vol. 30 (1953), p.53; Bin Cheng, *General Principles of Law*, London, Stevens, 1953, pp.121-36; M.M. Whiteman, *Digest of International Law*, vol. V, Washington, 1965, pp.224-30; Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, London, 1958, pp.162-5; Charles Rousseau, *Droit international public*, Paris, 1971, vol. I, pp.51, 382-384 (and see also the cautious but carefully open-minded comments by Judge Ago, "Second Report on State Responsibility", *Yearbook of the I.L.C.*, 1970, II, p.177 at pp.193-4, paras. 48-49).

448. The doctrine of abuse of rights is implicit in at least one of the judgments of the present Court. As Fitzmaurice has pointed out (*British Year Book of International Law*, vol. 30 (1953), p.53), the doctrine is implicit in the passage from the Judgment in the *United States Nationals in Morocco* case in which the Court stated that "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith" (I.C.J. Reports, 1952, p.212).

449. In the submission of the Government of Nauru the principle of abuse of rights comprehends three patterns of conduct:

(a) The misapplication of powers of administration and, or, legislation, with the result that the interests of the administration are persistently preferred to those of the legally protected interests of the inhabitants of the territory concerned.

(b) The wilful and persistent action, by an administration and the Government for which it acts, to frustrate the system of international accountability applicable to the territory administered by various means, and, in particular, by means of the refusal to report essential data concerning the policies of the administration and their implementation.

(c) The formulation of policies and the taking of key decisions relating to the administration of a territory subject to international standards of treatment without taking any account of those international standards.

450. In the submission of the Government of Nauru the responsibility of the Respondent State for abuse of rights arises from acts of maladministration falling severally within each of these categories of conduct. The substantial evidence has been reviewed in Part I above and also in Chapter 2 of this Part of the Memorial, and it will suffice to draw the attention of the Court to certain leading elements in the picture.

451. The evidence of the persistent preference of the Government of Australia for its own interests at the expense, quite literally, of the legally protected interests of the indigenous people of Nauru, consists (in part) of the Australian view that the legal regime of trusteeship simply did not apply to the phosphate industry. This view persisted until the time of independence, a fact which is established by the Australian Solicitor-General's paper dated 7 June 1965, which appears as Annex J in the *Record of Negotiations, 31st May - 10th June 1965 between Delegation of Nauru Local Government Council and Australian Officials Representing Administering Authority* (Annexes, vol. 3, Annex 2). The position of the Australian negotiators reflected the views of the Solicitor-General: see the Record of Negotiations, Annex K, page 1, where it is stated that "there is no obligation under the Nauru Agreement to pay royalties for phosphate mined at Nauru ....".

452. The second type of abuse of rights -- the deliberate and substantial frustration of the system of international accountability -- is evidenced by the extensive material relating to the refusal of the Australian Government to divulge critical data concerning the financial aspects of the phosphate industry. This evidence has been reviewed in detail elsewhere (See paras. 542-559). The persistent refusal to provide information prevented the Trusteeship Council from exercising its responsibilities effectively in accordance with the legal standards prescribed by Article 76 of the Charter and by the Trusteeship Agreement. The non-disclosure of essential data in this context constitutes a classic example of maladministration.

453. The third type of abuse of rights is a no less egregious case of maladministration. In 1955 the Australian Cabinet was considering whether or not to accelerate the production of phosphate on Nauru. No single reference is made in the course of deliberation to the responsibilities of the Australian Government by virtue of the regime of trusteeship. In all probability this was a normal pattern in policy-making concerning the phosphate deposits on Nauru. The consistent Australian view was that since

1919 the phosphate was no longer any concern of the Nauruans. (See Annexes, vol.4, Annex 63.)

454. If these three forms of abuse of rights and maladministration are taken together, what is revealed is a wilful disregard of the trusteeship regime as a legal process. In the Nauruan context the rule of law, the idea of due process, was constituted by the international legal regime of trusteeship, and accountability to the United Nations. The crucial aspect of the Nauruan economy, the phosphate deposits, which represented the long-term interests of the inhabitants of the trusteeship territory, was excluded from the due process of law in the form of the trusteeship regime. The granting of "royalties" was a completely arbitrary process which could not be evaluated in the absence of the essential economic data relating to the phosphate industry.

455. In the *Case Concerning Elettronica Sicula S.p.A. (ELSI)* the Chamber of the Court (in the context of a treaty formulation) defined "arbitrariness" as "not so much something opposed to a rule of law, as something opposed to the rule of law" (I.C.J. Reports, 1989, p.76, para. 128). Such a degree of arbitrariness characterised the attitudes and policies of the Australian Government and the British Phosphate Commissioners throughout the period. At all times decision making was based either upon the view that the trusteeship regime did not apply to the phosphate industry *tout court* (as a result of an entirely unreasonable construction of the Nauru Island Agreement of 1919), or upon the neglect of the standards of trusteeship altogether. Consequently, the abuse of rights involved a substantial failure to observe due process of law. It also involved an unattractive double standard, since Australian entitlement to administer Nauru depended upon the existence of the trusteeship, whereas the Respondent State looked exclusively to the benefits of its presence as administrator, and ignored the concomitant responsibilities of trusteeship.

456. In conclusion, the Applicant State claims that Australia, through its failure to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period of United Nations trusteeship and having regard to the conditions on which Australia allowed those lands to be exploited, abused its rights over the Territory of Nauru and with respect to the Nauruan people, and, by reason of its improper and arbitrary conduct as in Nauru, engaged in acts of maladministration, contrary to the principles of international law.

PART III

CHAPTER 6

BREACH OF THE DUTIES OF A PREDECESSOR STATE

Section 1. A General Principle of Responsibility

457. From time to time claims have been made that a predecessor State which transferred territory to another, or which granted independence to or otherwise recognized the independence of a new State formed on its territory, was liable for injurious consequences to the latter State by reason of harm caused to, or the damaged or dangerous state of, the territory in question.

458. Whatever the general position with respect to claims of this kind, the argument that a State which is responsible for the administration of territory is under an obligation not to cause long-term damage or harm to the territory, or a least is under an obligation to compensate for any such harm, is much stronger where the injured State is already in a legal relationship with the injuring State -- especially when the nature and content of the relationship relates directly to the legal interest which suffers harm. It is submitted that it is a general principle of international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable harm to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.

459. Such a principle underlies rules recognized in a number of analogous areas of the law. These include:

(a) the obligation of a belligerent occupant not to bring about fundamental changes in the regime or demography of the occupied territory (cf Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, 18 October 1907, Articles 43, 55, 56);

(b) the obligation of a State carrying out operations on the territory of another State with its consent to compensate for substantial injury caused to the receiving State's territory, according to the normal principles of State responsibility;

(c) the obligation of a State which has agreed to cede territory to another not to derogate from the grant by substantially and materially damaging or injuring the territory in question, and to transfer public property located in or properly attributable to the successor State to it without payment. (See Vienna Convention on State Succession in Respect of State Property, Archives and Debts, 7 April 1983, Articles 9, 11, 13: text in (1983) 22 I.L.M. p.304.)

460. The existence of an obligation of this general category or class was also recognized by the Permanent Court of International Justice in the two *German Settlers* cases. Both cases involved the question of the extent of German authority, subsequent to the conclusion of the Treaty of Versailles, to alienate public land in territory which was to be ceded to the new State of Poland under Article 87 of the Treaty.

461. In *German Settlers in Poland*, the Court affirmed that the relevant German authorities, in the period prior to transfer, were "competent to undertake transactions falling within the normal administration of the country": P.C.I.J. Ser. B No. 6 (1923), p.28. In similar vein, the Court went on to say that "the Prussian State was not forbidden to perform the usual administrative acts under its pre-existing contracts with private individuals, especially when the delay in the performance of such acts had been due to the disturbed conditions arising from the war" (P.C.I.J. Ser. B No. 6 (1923), p.40.) These statements plainly imply that there were limits on the administrative powers of the German authorities during this period -- even though the Treaty had not yet come into force.

462. The case of *Certain German Settlers in Polish Upper Silesia* involved the period after the entry into force of the Treaty of Versailles, and before the transfer of the territory. Again, Germany continued to be competent to administer the territory during this period, but again its competence to do so was not unlimited. The relevant provisions of the Treaty, the Court held...

> "cannot involve the immobilization of all movable and immovable property belonging to the State during the period from the day of the coming into force of the Peace Treaty until the transfer of sovereignty over Upper Silesia. Germany

> undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty..."
>
> (P.C.I.J. Ser. A No. 7 (1926), p.30.)

The Court went on to say that "such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement" (ibid.).

463. It should be noted that in that case the land grants concerned extended to only a fraction of the private land in Upper Silesia, and that the land was not itself harmed in any way by the transfer: it simply became part of a larger pool of agricultural land in private ownership, and subject to the lawful acts of eminent domain of the Polish State.

Section 2. Application of the Principle in the Present Case

464. The "transfer" of the Island of Nauru to the Applicant State on independence is not to be regarded as a case of State succession operating against an assumption of a clean slate. The independence of a trust territory is not a case of transfer of territory, since, first, the Administering Authority has no sovereignty over the territory, and, secondly, the people of a trust territory are an already existing international entity to whom duties are owed by the Administering Authority, both under the Trusteeship Agreement or otherwise under general international law. The emergence of a new State from the status of a trust territory in accordance with the principle of self-determination embodied in the trusteeship arrangements is not the emergence *ab initio* of an entirely new legal entity, but the emergence from a state of dependence of a people whose rights and status are already distinctly recognized, and to which the predecessor State is in principle accountable.

465. Thus the present claim is stronger again than that which was asserted in the *Polish Settlers* cases. There the only relevant relationship which existed between Germany and Poland was that constituted by the agreement to cede the territory in Articles 87-88 of the Treaty of Versailles. In the present case the arrangements leading to independence were the outcome of an *existing* legal relationship between the parties. That relationship had a direct bearing

on the disposition of the natural resources of Nauru, as has been demonstrated (see para. 415-419 above). It gave rise to obligations towards the Nauruan people, and the eventual grant of independence constituted only part performance of those obligations.

466. Moreover the Court in the *Polish Settlers* cases was influenced by the principle of respect for private rights of the individuals concerned, rights on which they had relied in settling in the territory. In the case of Nauru, the British Phosphate Commissioners -- despite Australian claims to the contrary (see paras. 334-336) -- were not a private entity such as a company. They were nominees of the partner Governments, accountable to them, and required to operate (as nearly as possible) on a non-profit basis. They were not separately incorporated and had no limited liability. They paid no taxes. As against the Nauruan people, they are not to be treated as the independent holders of private vested rights, separate and distinct from the position of the Administering Authority.

467. That the predecessor State does owe a general duty of this kind is confirmed by the settled international practice with respect to Namibia. Decree No. 1 of the United Nations Council for Namibia (Annexes, vol.4, Annex 21), which has been affirmed and endorsed both by the Security Council and the General Assembly (see e.g. General Assembly Resolution 9/42, 5 December 1984, para. 14), expressly envisages that "the future Government of an independent Namibia" may take proceedings to vindicate its rights under the Decree (see para. 6 of the Decree). That Decree is not merely a self-contained legislative act, but is a reflection of a general legal concern to preserve the natural resources of a territory from depredation by the State for the time being responsible for its administration, and which has an internationally-recognized duty to the people of the territory to treat their interests as paramount. (Compare W.M. Reisman, "Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate and Trusteeship Obligations" (1989) 10 *Michigan Journal of International L*aw p.231 at pp.231-2. See also United Nations Conference on Succession of States in respect of Sate Property, Archives and Debts, Resolution Concerning Namibia, (1983) 22 I.L.M 305, expressly reserving "all the rights of the future independent State of Namibia": for the text of the Resolution see Annexes, vol. 4, Annex 23.)

Section 3. Conclusion

468. To summarize, if the claims referred to in paragraphs 457-458 above are the product of a principle of law which requires a State not to use its own territory in such a way as to cause substantial harm to a successor, then the present claim presents a much stronger case, since under the regime of trusteeship, the territory used did not belong to the Administering Authority, and since the people of the territory was not, with respect to that territory, a third party in the sight of international law. It was, quite simply, their territory, their patrimony, that was involved.

PART III

CHAPTER 7

THE UNLAWFUL DISPOSAL OF THE OVERSEAS ASSETS OF THE BRITISH PHOSPHATE COMMISSIONERS

Section 1. Background: The Disposal of Assets in 1987

469. In accordance with the Agreement relating to the Phosphate Industry of 1967 (Annexes, vol. 3, Annex 6), between the Nauru Local Government Council and the Governments of Australia, New Zealand and the United Kingdom, the assets of the British Phosphate Commission on Nauru were transferred to the Government of Nauru in 1970 (after the final payment for these assets had been made). That transaction related exclusively to the operations and assets on Nauru. Subsequently, various assets of the British Phosphate Commissioners remained in being overseas, such assets consisting of property and portfolios of shares.

470. In 1987, the Governments of Australia, New Zealand and the United Kingdom concluded an agreement effecting the winding up of the affairs of the British Phosphate Commissioners, and the disbursement of its assets (Annexes, vol. 4, Annex 31).

Section 2. The Nauruan Response

471. The Government of Nauru was disturbed to hear of the impending disposal of the overseas assets of the British Phosphate Commissioners and reacted promptly. In a Note dated 5 January 1987 to the Australian Government the Government of Nauru expressed its interest in the assets and requested information. So far as is material the text of the Note reads as follows:

> 'The Department has the further honour to request the Australian High Commission information on whether the Press reports relating to the winding up of the B.P.C. are true, and if so, whether there is any tentative time schedule for the winding up. The Government of the Republic of Nauru is interested to have

> this information and requests that it be consulted in matters relating to disbursement of the assets of the B.P.C. The Government of the Republic of Nauru feels that such consultation would be particularly relevant in the context of the pending hearings of the Commission of Inquiry into the rehabilitation of the phosphate worked-out lands, issued by the Cabinet of the Republic of Nauru on the 3rd of December 1986, whose issue was already notified to the High Commission."

472. In its reply dated 20 January 1987 (Annexes, vol. 4, Annex 80) the Australian Government confirmed "that arrangements are in hand and that it is proposed that the Partner Governments, including the Australian Government, sign an agreement shortly to bring this about".

473. The reaction of the Government of Nauru was to affirm its interest in the assets of the British Phosphate Commissioners. In its Note of 30 January 1987 (Annexes, vol. 4, Annex 80) Nauru stated the following:

> "The Department of External Affairs of the Republic of Nauru presents its compliments to the Australian High Commission and has the honour to acknowledge with thanks the High Commission's Note no. 3/87 dated 20 January 1987 in respect of the Department's query concerning the earlier press reports on the winding-up of the British Phosphate Commissioners.
>
> The Department of External Affairs has the further honour to note that an agreement will be signed shortly among the three partner Governments to facilitate winding-up of the affairs of the British Phosphates Commissioners. The Department expresses regret that the three partner Governments are contemplating the winding-up of the British Phosphates Commissioners and distribution of their funds at the present juncture, when Nauru has set in motion an independent and impartial Commission of Inquiry into the question of rehabilitation and restoration of the phosphate lands worked-out before the independence of Nauru.
>
> In view of the above, the Department of External Affairs requests the three partner Governments of Australia, New Zealand and the United Kingdom to be good enough at least to keep the funds of the British Phosphates Commissioners intact without disbursement, until the conclusion of the task of the said Commission of Inquiry.
>
> The Department further requests the three partner Governments that the office Records and other documents of the British Phosphates Commissioners may kindly be kept preserved and that the said Commission of Inquiry be permitted to have access to and use of these Records and documents, in so far as they may be relevant and useful for the fulfilment of the mandate of the said Commission."

474. The issue was pursued by the Nauruan Government after the conclusion of the tripartite Agreement on the disposal of the assets on 9 February 1987. His Excellency President Hammer DeRoburt raised the question in a letter dated 4 May 1987 to the Honourable Bill Hayden, the then Australian Minister for Foreign Affairs.[1]

475. Mr Hayden's response, in a letter dated 15 June 1987 (Annexes, vol. 4, Annex 80) was as follows:

> "I refer to your letter dated 4 May regarding the disposal of the assets of the British Phosphate Commissioners.
>
> The agreement signed on 9 February 87 which completed the wind up process followed termination of the BPC's functions in 1981. The BPC and the Partner Governments have discharged fairly all outstanding obligations. The residual assets of the BPC were not derived from its Nauru operations.
>
> Australian parliamentary practice requires that monies accruing to the Government are credited to consolidated revenue for allocation in accordance with normal budgetary procedures. That course was followed in the case of the BPC residual assets.
>
> The Australian Government is carefully examining Nauru's request for Australia to assist the Commission of Inquiry. We expect shortly to be in a position to advise the extent to which Australia will be able to meet that request."

476. This letter evoked the following comment from President Hammer DeRoburt in a letter dated 23 July 1987 (Annexes, vol. 4, Annex 80):

> "I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the B.P.C., that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the B.P.C. were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time."

477. In the result the Government of Nauru clearly affirmed its legal interest in the disposal of the assets of the British Phosphate Commissioners.

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[1] Unfortunately the file copy of that letter has been lost.

Section 3. The Nauruan Claims

478. In the submission of the Government of Nauru this correspondence puts on record the Nauruan claim to an equitable share of the value of the assets which were marshalled prior to distribution in accordance with the trilateral Agreement of 1987.

479. The "Agreement between the Government of Australia, the Government of New Zealand and the Government of the United Kingdom...to terminate the Nauru Island Agreement 1919" concluded on 9 February 1987 (Annexes, vol. 4, Annex 31) is a remarkable document by any standard of comparison.

480. It refers to funds derived from the administration of a trust territory but contains no reference to the Trusteeship Agreement. It involves the marshalling and disposal of assets in which the Republic of Nauru has a legal interest but excludes Nauruan participation in the procedure.

481. Most remarkable of all, the Agreement recognises the existence of a Nauruan legal interest. This recognition is the necessary consequence of the function of terminating the 1919 Agreement. No doubt the role of the British Phosphate commissioners involved the 1919 Agreement as a condition precedent, but the legality of the administration of Nauru by the Respondent State *subsequently* depended, successively, on the Mandate and the Trusteeship Agreement. The power of the British Phosphate Commissioners to accumulate and to deal with the assets arose from the Trusteeship Agreement and, earlier, the Mandate. The consequence of referring expressly to the 1919 Agreement and the Commissioners was to refer also to the legal concomitant of the existence of the Commissioners and the administration of Nauru during the currency of the trusteeship.

482. The tripartite agreement of 1987 constitutes an unequivocal recognition of the Nauruan interest in the assets of the British Phosphate Commissioners.

483. In this context the basis of liability consists of two independent elements:

(a) The wrongful disposal of the asset in spite of the recognition of the existence of a Nauruan legal interest in the provisions of the Agreement of 1987.

(b) Alternatively, the wrongful disposal of assets in which, irrespective of the provisions of the 1987 Agreement, Nauru had a legal interest.

484. When the relevant documents are available Nauru will be in a position to present the data establishing the value of the assets marshalled and the proportion -- that is to say, the Australian allocation -- to which Nauru is entitled. For present purposes, however, such data are not needed as the Court is requested at this stage to make a declaration as to the existence of Nauru's entitlement without more.

PART III

CHAPTER 8

THE FORMS OF LOSS CAUSED TO NAURU

Section 1. Introduction

485. In the previous chapters of the present Part of the Memorial the legal bases of the Nauruan claim were described systematically. A priority of significance was given to violations of the provisions of Article 76 of the United Nations Charter and of the Trusteeship Agreement, but other relevant bases of international responsibility were indicated. While it is necessary for the Applicant State provide a full account of the bases of claim, the picture is not complete unless the relevant heads of damage, or forms of loss, are indicated at the same time.

486. The Applicant State has confined its petition for relief to a request for a declaration concerning Australia's responsibility and the consequent duty to make appropriate reparation for the damage and prejudice suffered. The assessment of such reparation, in case this proves necessary, lies in the future. Nonetheless, it will be of assistance to the Court if in the present Memorial the Government of Nauru provides an account of the specific types or heads of loss resulting from the violations of international law for which the Australian government bears responsibility.

487. In the present proceedings the claim of the Applicant State relates to five forms of loss: the costs of rehabilitation, economic loss caused by the unwillingness of the Respondent State to make an equitable return in relation to the process of extraction of phosphate; the value of the overseas assets of the British Phosphate Commission; and reparation in respect of payment for British Phosphate Commission assets purchased with Nauruan funds. The wrongful disposal of the overseas assets of the British Phosphate Commissioners has been examined in the previous chapter.

Section 2. The Various Forms of Loss

A. The Costs of Rehabilitation of the Worked-Out Phosphate Lands

488. The Government of Nauru considers the claim to the costs of rehabilitation to be of paramount importance. Since independence the Government has been able to ensure that proper provision has been made to cover the costs of an eventual rehabilitation programme for those lands worked out since independence. However, prior to independence one-third of the area of the island had been rendered completely unusable as a result of the radical effects of phosphate mining, and this had occurred without any, or any adequate, provision being made to cover the costs of rehabilitation of the worked out areas.

489. Given the extremely recalcitrant environment created by phosphate mining in Nauru, the extensive character of the mining, the fact that the homeland of the indigenous people of Nauru has been threatened in terms of its physical integrity, and the fact that Nauruans have a strong sense of national identity, the failure to make provision for rehabilitation represents at once a serious affront to the vital interests of Nauru, a major drawback to the condition of independent statehood, and also a threat to the future economic needs of the people of Nauru. Consequently, the context of phosphate mining is not comparable with the normal context of the rehabilitation of land affected by mining operations.

490. This lack of comparability has an additional, and most important, legal dimension. The context -- in legal terms -- is not that of mineral concessions, or mining law and practice, but of the entitlements of the people and Government of Nauru by virtue of the obligations generated by Article 76 of the United Nations Charter and the provisions of the Trusteeship Agreement for the Territory of Nauru.

B. Economic loss caused by the Failure of the Respondent State to make an Equitable Return in Relation to the process of extracting phosphate

491. The regime instituted in 1919 for the exploitation of phosphate deposits on Nauru involved a massive and consistent exercise in external

economic autocracy, consisting of three principal elements: the expropriation of the phosphate industry by foreign powers; a "trading" monopoly in favour of the same powers (but especially in the interests of Australia); and the payment of "royalties" to the indigenous landowners on a basis which had no connection with royalties as normally understood in legal and commercial practice.

492. The "royalties" were derisory and inequitable in scale and they were granted by way of concession (their legality being doubted by the Australian Government and its advisers). However at least in principle, the payments commonly described as "royalties", had they been paid on an equitable basis, would have constituted a form of treatment in accordance with the legal standards of the trusteeship regime.

493. The non-payment of an equitable return by the foreign phosphate operation constituted a form of economic loss flowing directly from the breach of the obligations of trusteeship and therefore form a proper head of claim in the present proceedings. The net loss of earnings has been the subject of expert analysis by Mr. Walker (Appendix 2).

C. Loss of Land Use

494. The inevitable concomitant of the claim to the costs of rehabilitation is a claim to reasonable compensation for loss of land use. Like the question of rehabilitation, this stems essentially from the failures on the part of the Respondent State to comply with the principles and standards of the legal regime of trusteeship. Consequently, municipal law analogies concerning compensation in cases of wrongful disposition or expropriation are not directly in point. At the same time, it is relevant to recall that the normal international law standard in such cases involves compensation for loss of use.

495. The deprivation of the use and enjoyment of land is generally recognised as a form of loss calling for reparation, whether the loss is characterised in terms as expropriation or as a wrongful deprivation of the use and enjoyment of property: see *Rolland et Consorts (France* v. *Germany)*, Franco-German Mixed Arbitral Tribunal, 5 Recueil des décisions des tribunaux arbitraux mixtes (1926), 121; M.M. Whiteman, *Damages in International Law*, vol. II, Washington, 1937, p.1383; *The Lord Nelson (Great*

Britain v. *United States)*, Nielsen's Report (1926), p.432 at pp.434-5; G.H. Hackworth, *Digest of International Law*, vol. V, Washington, 1943, p.739; M.M. Whiteman, *Digest of International Law*, vol. 8, Washington, 1967, pp.1006-20; *Foremost Tehran, Inc.* v. *Iran*, Iran-U.S. Claims Tribunal Reports, vol. 10, p.228 at p.251 (Decision of 10 April 1986); *Case of Sporrong and Lonnroth*, European Court of Human Rights, Series A, No. 52 (Judgment of 23 September 1982), pp.24-25, para. 63.

D. REPARATION IN RESPECT OF THE PAYMENT FOR B.P.C. ASSETS PURCHASED WITH NAURUAN FUNDS

496. In accordance with the Phosphate Industry Agreement of 1967 (Annexes, vol. 3, Annex 6), the Government of Nauru, in the period following, paid by instalments a price of 21 million Australian dollars for the assets of the British Phosphate Commissioners at Nauru. The process of payment was completed by 18 April 1969 (see M. Williams & B. MacDonald, *The Phosphateers*, Melbourne, Melbourne University Press, 1985, pp.502-3). The Agreement was concluded by the Nauru Local Government Council prior to independence and was, in a very real sense, a part of the price for independence: see Nauru Talks, 1967, Summary Records of Discussions, p.108, Nauruan Delegation 67/8, para. 2 (Annexes. vol. 3, Annex 5). In this paper the Nauruan Delegation stated that it was "forced to negotiate under heavy pressure from their natural aspirations to attain independence by 31 January 1968".

497. The payments were made on sufferance and were the precondition for the return to Nauruan control of the phosphate deposits, a belated act of restitution, and which, in fact, for Nauru constituted the final episode in the process of achieving a substantial independence from Australia and its associates.

498. In the view of the Government of Nauru, the forced purchase of access to its own natural resources was a further segment in the long line of inequitable treatment at the hands of the Australian Government and its collaborators. The payment compounded the unjust enrichment resulting from the economic management of phosphate affairs in the trusteeship period and before. It was extracted during the very sensitive period immediately prior to independence in January 1968, and one of several unusual features was the payment required by the outgoing authority for the

capital assets of the British Phosphate Commissioners on the island: see the provisions on capital assets in Articles 7 to 11 of the Agreement of 1967.

499. This repertoire of inequitable practices could easily be extended. Two further examples may suffice. In the first place, the British Phosphate Commissioners retained capital assets outside Nauru, with the result that the expenditure of 21 million Australian dollars involved a substantial payment in the context of a remarkably incomplete exercise in restitution. Secondly, the Nauruans, prior to independence, were required to give an undertaking to supply phosphate "exclusively to the Partner Governments": see Article 5(1) of the Agreement. After independence, however, this latter commitment was relaxed.

500. In the submission of the Government of Nauru, the forced purchase of the assets of the Australian Government and its associates, as a concomitant of the termination of the trusteeship regime, was a form of loss flowing from the cumulative breaches of the legal obligations specified in Part III of the present Memorial and thus merits appropriate reparation. The assets purchased were themselves derived from the inequitable conduct of the British Phosphate Commissioners, as the instrumentality of the three so-called partner Governments.

Section 3. Conclusion

501. The iteration of the forms of loss resulting from the breach of the obligations of the trusteeship regime fives appropriate colour and emphasis to the wrongs which are the subject of the present proceedings. At this stage the account is auxiliary to the issues of liability and therefore to a certain extent provisional. The Government of Nauru reserves the right to supplement and modify the data directly relating to the compensation at the appropriate time.

PART IV

MATTERS OF SPECIAL SIGNIFICANCE

PART IV

CHAPTER 1

INTRODUCTION

502. Part I of this Memorial outlined the history of Nauru from the commencement of the German period until independence in 1968. That Part provided the necessary background against which to set out the bases of the responsibility of the Respondent State: this was done in Part III. It is now necessary to return to a number of the more crucial incidents and issues which arose during the period from 1919 until 1968, and to demonstrate in further detail their significance in terms of the Applicant's claims.

503. In this Part, accordingly, it is proposed to deal with the following matters of special significance:

(a) the Nauru Island Agreements 1919 and 1923 (Chapter 2);

(b) the relationship between the Australian Administration and the British Phosphate Commissioners (Chapter 3);

(c) inferences to be drawn from Australian reticence over the British Phosphate Commissioners' Accounts (Chapter 4);

(d) proposals for resettlement and rehabilitation, and in particular the implications of the Australian approach (Chapter 5); and

(e) the significance of the transactions surrounding independence (Chapter 6).

PART IV

CHAPTER 2

THE REGIME OF THE NAURU ISLAND AGREEMENTS 1919 AND 1923

504. The events surrounding the conclusion of the 1919 Agreement have been described in some detail in Part I of this Memorial (see paras. 36-53). It is necessary here only to make a number of points arising from the Agreement.

505. The 1919 Agreement was frequently criticized as inconsistent with the Mandate and Trusteeship instruments, and with the principle of self-determination which underlay and grew out of those instruments. Concern at the provisions and impact of the 1919 Agreement was expressed both by the Permanent Mandates Commission and within the United Nations. For example, the United Nations Visiting Mission to Nauru in 1962 drew attention to four major causes of concern. It observed:

> "It is important to note (a) that the main purpose of the Agreement was to ensure the maximum supply of phosphate at a minimum consumer cost for the countries which had provided the capital; (b) that the Agreement preceded the granting of the Mandate in 1919; (c) that, although the Agreement envisaged the payment of administration costs in Nauru from the proceeds of the industry, there was no specific provision at the time when the Agreement was made that royalties should be paid to the people of Nauru; and (d) that no reference was made to the Agreement either in the Mandate or in the Trusteeship Agreement."
>
> (United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962, *Report on Nauru, Trusteeship Council Official Records*, 29th Session, 31 May-20 July 1962, Supplement No.2, paragraph 102. See also above paras. 65, 67-70, 112, 115-116, 323-331, 364, 370, for further references.)

506. Neither the Nauru Island Agreement 1919 nor the 1923 Amending Agreement was submitted to the League of Nations, nor were they registered under Article 18 of the League of Nations Covenant. When the question was specifically raised in the United Kingdom Parliament, the Government replied that the 1919 Agreement was "a commercial agreement, and... a commercial undertaking is not a subject for the League of Nations" (U.K.

Parl. Debs. (H. of C.), 23 June 1920, vol. 130 col. 2182 (oral answers)). Thus there was a considered decision not to submit the agreement to the League of Nations. It was never formally approved or agreed to either by the League of Nations or by the United Nations.

507. It is submitted, for the reasons developed in detail in Part III of this Memorial, that the actions of the Respondent State were inconsistent with the Trusteeship regime and with related principles of general international law. And these breaches, however much the Respondent State may have sought to relate them to the 1919 Agreement, were not required by that Agreement. It is true that the exploitative tendency which, as has been shown in Part I, motivated the 1919 Agreement was in tension with the principle of trusteeship. But the Agreement itself did not preclude the Respondent State from complying, successively, with the Mandate and the Trusteeship instruments, and with its related obligations under general international law. In that sense, which is, it is submitted, the only legally relevant sense, the 1919 Agreement was not inconsistent with the international obligations assumed by the Respondent State. This can be demonstrated, *inter alia*, by a straightforward survey of its provisions.

508. Under Article 2 of the Agreement, the expenses of the administration were to be met out of the sale of phosphates, but this was "only so far as they are not met by other revenue". There was nothing in the Agreement to prevent the Australian Government from making grants in aid of the administration of the Territory. The fact that this never occurred was a matter of choice, not of any requirement under the Agreement.

509. Under Article 8, the capital necessary for the working expenses of the Commissioners was to be contributed by the partner Governments in agreed proportions. There was nothing in the Agreement which required capital requirements to be met out of the phosphate revenue, as was almost exclusively the case.

510. Under Article 11, the price of phosphate was to be set at such a level as would meet certain stated expenses, or costs incurred "for other purposes unanimously agreed on by the Commissioners and other charges". There was nothing in the Agreement to prevent the Commissioners agreeing on expenses to be incurred in rehabilitating mined out lands, or otherwise in pursuance of the trust responsibility. There was nothing in the Agreement to

prevent the Administrator imposing an appropriate charge to meet costs associated with the fulfilment of the trust responsibility.

511. Under Article 12, the partner Governments could, separately and of their own volition, direct that surplus funds accumulated by the Commissioners were to be held in trust "to such uses as those Governments may direct". Those uses could have been in pursuance of the trusteeship obligations of the Government in question.

512. Under Article 13, the partner Governments agreed not to interfere "with the direction, management, or control of the business of working, shipping, or selling the phosphates". But this did not mean that the "business" of the Commissioners was to take place in a legal vacuum, exempt from regulation by laws duly made under the authority conferred by the Mandate and Trusteeship regimes to govern the territory. As the Court has remarked in an analogous context, that authority was the sole basis for the presence of the Administering Authority (*Status of South West Africa*, I.C.J. Reports 1950, p.128 at p.133). The Respondent State retained the power, notwithstanding Article 13 of the 1919 Agreement, to make laws for Nauru, and it exercised that power, either directly under its legislative power over Australian territories (as with the Nauru Act 1965 (Cth)), or through its official appointee, the Administrator (as with the Lands Ordinances of 1921 and 1927). It could have retained in force the existing German laws regulating the conduct of mining, which required a degree of rehabilitation of mined lands and the payment of compensation to the landowner (see paras. 24-25, 27). The fact that it chose, by the Laws Repeal and Adopting Ordinance 1922 (Nau), to repeal those laws and not to replace them with any equivalent safeguards was not something which was required by the 1919 Agreement.

513. This point was expressly accepted by the Respondent State. For example during the Trusteeship Council's examination of the Annual Report for Nauru for 1947-8, the following exchange took place:

> "Question 20: Does Article 2 of the Agreement of 1919 absolve the Administering Authority of any obligation to make grants to the Trust Territory? Have any such grants been made? Has this arrangement limited the amounts expended in the interests of the well-being and progress of the inhabitants? (Iraq).
>
> Answer: Nauru is administered in accordance with the terms of the Trusteeship Agreement and the application of Article 2 of the Agreement of 1919 would not

> in any way affect the obligations of the Administering Authority under the Trusteeship Agreement. No grants have in fact been made."
>
> (United Nations, *Trusteeship Council Official Records*, 5th Session, Annex, Doc. T/347, 22 June 1949, p.47.)

514. It is submitted that the response of the Australian representative in 1949 represented the correct legal position. The 1919 Agreement left it open to the Respondent State to comply with the obligations successively undertaken under the Mandate and Trusteeship instruments.

515. The real difficulty was not the 1919 Agreement as such, but the fact that in important respects the Respondent State treated the territory of Nauru as subject to something approaching a disguised annexation, just as the British Phosphate Commissioners engaged in what might be described as a form of creeping and disguised expropriation, one no less real because it used the terminology of commercial relationships and dealings. It may be noted that in determining whether there has been an "expropriation" or "taking" of property, international law looks to the substance, not the legal form of the transaction (see the athorities cited in M.M. Whiteman, *Digest of International Law*, Washington, 1967, vol. 8, pp.980-97, 1006-20). The same approach is taken in national legal systems which have constitutional protections in respect of the acquisition of property. This is true, for example, both of the United States (*Pennsylvania Coal* v. *Mahon* 260 U.S. 393 (1922); *Penn Central Transportation Co* v. *City of New York* 483 U.S. 104 (1978); *First English Evangelical Lutheran Church* v. *County of Los Angeles* 107 Sup. Ct. 2378 (1987)), and Australia (*Trade Practices Commission* v. *Tooth & Co Ltd* (1979) 142 C.L.R. 397; *Commonwealth of Australia* v. *State of Tasmania* (1983) 158 C.L.R. 1)[1].

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[1] However it should be noted that the Australian constitutional guarantee against the acquisition of property other than on just terms (section 51(xxxi) of the Constitution of the Commonwealth of Australia) did not apply to territories such as Nauru, which were governed under the plenary legislative power conferred by section 122 of the Constitution: see *Teori Tau* v. *Commonwealth of Australia* (1969) 119 C.L.R. 564.

PART IV

CHAPTER 3

THE RELATIONSHIP BETWEEN THE AUSTRALIAN ADMINISTRATION AND THE BRITISH PHOSPHATE COMMISSIONERS

Section 1. Introduction

516. Under the 1919 Agreement, in conjunction with the 1923 Agreement, Australia became responsible for the administration of Nauru, a responsibility which it exercised on its own behalf as well as on behalf of the two other Governments. That situation endured until independence. The effect was that the appointment and dismissal of the Administrator, all instructions as to the exercise of the Administrator's powers, the confirmation or disallowance of Ordinances made by the Administrator, and even general legislative power over the Territory, were all powers vested in and exercisable by the Commonwealth of Australia, acting through its Executive or, in the case of legislation, through the Parliament of the Commonwealth of Australia. As a corollary of this actual governing authority, Australian diplomatic personnel acting on Australian instructions represented the Administering Authority in all League of Nations and United Nations discussions of Nauru from 1920 until 1968. Although Australia consulted from time to time with the other partner governments with respect to the exercise of these powers, the final and operative decisions as to their exercise were made by Australia on its own authority.

Section 2. The Nauru Act 1965 (Cth)

517. This situation was confirmed and made even more explicit by the Nauru Act 1965 (Cth), which was the governing legislation during the crucial pre-independence period. That Act gave effect to a further Agreement between the three partner Governments relating to Nauru, Canberra, 26th November 1965: *Australian Treaty Series* 1965 No. 20; 598 *U.N.T.S.* 81. The

Agreement was scheduled to the Nauru Act 1965 (Cth): see Annexes, Volume 4, Annex 39.

518. The 1965 Agreement provided in part as follows:

> "*Article* 1
>
> (1) A Legislative Council, a majority of which are to be elected by the Nauruan people, is to be established as from the appointed day.
>
> (2) Without affecting the powers of the Commonwealth Parliament to make laws for the government of the Territory--
>
> (a) the Legislative Council is to have power to make Ordinances for the peace, order and good government of the Territory except Ordinances with respect to--
>
> (i) defence;
>
> (ii) external affairs;
>
> (iii) the phosphate industry (including the operation, ownership and control of that industry);
>
> (iv) phosphate royalties; and
>
> (v) the ownership and control of phosphate-bearing land; and
>
> (b) the Governor-General is to have power as from the appointed day to make Ordinances for the peace, order and good government of the Territory with respect to--
>
> (i) defence, internal security and the maintenance of peace and order;
>
> (ii) external affairs;
>
> (iii) the phosphate industry (including the operation, ownership and control of that industry);
>
> (iv) phosphate royalties; and
>
> (v) the ownership and control of phosphate-bearing land.
>
> (3) Ordinances made by the Legislative Council are not to have the force of law until assented to by the Administrator, or, if reserved by the Administrator for the Governor-General's consideration, by the Governor-General. The Administrator is to have a general discretion to

> reserve Ordinances for the Governor-General's consideration. The Administrator is, if required by an Act of the Commonwealth Parliament to do so in specified cases, to reserve Ordinances for the Governor-General's consideration.
>
> (4) The Governor-General is to have power to disallow an Ordnance that has been assented to by the Administrator.
>
> (5) Ordinances made by the Governor-General are to be subject to disallowance by either House of the Commonwealth Parliament as provided by Act of that Parliament.
>
> (6) The application of its own force, in or in relation to the Territory, of an Act of the Commonwealth Parliament, or of a regulation under such an Act, is not to be affected by an Ordinance.
>
> *Article 2*
>
> (1) An Executive Council is to be established, consisting of--
>
> (a) the Administrator; and
>
> (b) members appointed by the Governor-General.
>
> (2) The members appointed by the Governor-General are to include persons appointed from amongst the members of the Legislative Council elected by the Nauruan people. A person snot to be appointed as a member of the Executive Council from amongst the members of the Legislative Council elected by the Nauruan people unless he has been nominated for the purpose by a majority of those members of the Legislative Council.
>
> (3) The Executive Council is to have such powers and functions as are conferred on it by law, including the function of tendering advice on any matter referred to it by the Administrator for advice.
>
> *Article 3*
>
> Subject to the provisions of this Agreement, the administration of the Territory is, on and after the appointed day, to be vested in an Administrator appointed by the Government of the Commonwealth of Australia."

519. The first paragraph of the preamble to the Agreement recites that it has been made "conformably with the Trusteeship Agreement", a further clear recognition by those concerned of the legitimacy of Australia's special position and role with respect to the administration of Nauru.

Section 3. Actual Relations between Australia and the British Phosphate Commissioners

520. Given its general executive and legislative authority over Nauru, the way in which Australia exercised that authority was crucial in determining whether the international obligations assumed under the Trusteeship Agreement and under general international law would be complied with. As has been seen, the balance between the asserted proprietary rights of the British Phosphate Commissioners and the manifest economic interests of the partner Governments under the Nauru Island Agreement, on the one hand, and the principle of trusteeship, on the other hand, was a precarious one. It was, no doubt, possible for a balance to be struck between the rights and long-term economic security of the Nauruan people and the conduct of mining operations by the British Phosphate Commissioners. There is no inherent or necessary conflict between proprietary rights and claims, and the governmental authority which is to be exercised in the interests of the relevant community. But in the particular situation of Nauru, any resolution of the tension between the claims of the Commissioners under the 1919 Agreement and those of the Nauruan people under the Mandate and the Trusteeship Agreement could only occur if the Respondent State was prepared to direct its mind to that issue, to have regard to the rights of the Nauruan people, and to resolve any conflicting claims having proper regard to the principle of trusteeship. It is precisely this that Australia failed to do.

A. DISPUTES OVER THE LANDS ORDINANCES

521. One period which reveals this failure, and which set a pattern which was not departed from during the period of Australian administration, occurred during the 1920s. This involved a series of disputes over amendments to the Lands Ordinance of 1921. The result in each case clearly favoured the British Phosphate Commissioners, by reason of the deliberate decision by Australia to use its governmental powers to give priority to its own commercial interests over the long-term interests -- and clearly expressed wishes -- of the Nauruans. Since the basic provisions of the Lands Ordinance of 1921, as amended in 1927, were not changed throughout the period of Australian administration, this episode assumes even greater significance.

522. Even before the provisions of German law applicable to Nauru were terminated by the Laws Repeal and Adopting Ordinance 1922, the Administrator had enacted a Lands Ordinance, Ordinance No. 12 of 1921 (Annexes,), which came into operation on 24 October 1921. The provisions of the Ordinance are analyzed in paragraphs 84-89 above. The Ordinance made it an offence punishable by fine or imprisonment for landowners to grant rights to others without the consent of the Administrator, and established a scheme by which the British Phosphate Commissioners became the only parties to whom a lease of phosphate land could be made. The most significant terms of such a lease (the amounts payable, to whom and when they were payable, what powers the lessee acquired over trees and shrubs on the leased land, and indeed what land was phosphate bearing land for this purpose) were determined by or pursuant to the Ordinance. There was no element of freedom of choice on the part of the landowners as to the terms of the lease.

523. The substantial increase in the rate of mining that occurred after 1921 gave rise to considerable concern on the part of the Nauruans, both in terms of the extent of royalties paid and the future effects on the habitability of the island. As a result the Australian Administrator, General Griffiths, issued the Lands Ordinance 1925 (Ordinance No. 11 of 1925), which provided that no land could be mined to a depth of more than twenty feet, without the approval in writing of the Administrator, which would only be given in exceptional circumstances.[1]

524. Griffiths took this measure, as was reported (Unfortunately the text of the 1925 Ordinance - which was never officially published by the Respondent State - cannot be located) to the Australian Prime Minister, at the instance of the Nauruans:

> 'He [Griffiths] said that it was the natives themselves who most strongly desired that mining should not exceed this depth. They were firmly convinced that if this depth were exceeded it would be impossible to plant any food producing trees in the future. It was therefore the representations of the natives that were responsible for the ordinance.
>
> He considered that the restriction of mining to a depth of twenty feet was really necessary so that food-bearing lands might be assured for future generations. The Nauruan population was a rapidly increasing one, and the natives and himself

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[1] The 1925 Ordinance was never officially published, and no copy of the complete text apparently survives.

> were obliged to think of their future. The interests of the natives were the first consideration: the phosphate industry was a secondary consideration."
>
> (Memorandum to Prime Minister, 25 March 1926, Australian Archives CRS A518, D 112/6/1; Annexes, vol.4, Annex 50.)

525. Griffiths' measure was vehemently opposed by the Commissioners. Dickinson protested that:

> "This Ordinance was promulgated without consultation with the Commissioners of this Board and if it was issued without the knowledge or assent of the Australian Government such a proceeding on the part of the Administrator of Nauru was high-handed. In other respects the Administrator has acted on the assumption that he is under no obligation to even consult those who are responsible for the conduct of the only industry in the Island."
>
> (Letter to Under-Secretary of State, Dominion Office, 31 December 1925; Annexes, vol.4, Annex 48)

526. The Australian and New Zealand Commissioners united with Dickinson in his protest, and the Australian Government took the desired action. Dickinson was informed by the Dominions Office that...

> "the Commonwealth Government decided in December last not to confirm the proposed Ordinance until the question had been further considered... [T]he Administrator was informed of this decision."
>
> (Letter, 27 January 1926; Annexes, vol.4, Annex 49)

527. In fact the 1925 Ordinance was not confirmed by the Commonwealth of Australia and never entered into force. In response to a question from a member of the Permanent Mandates Commission, Sir Joseph Cook replied that...

> "this Ordinance had been put forward at an inopportune moment. The whole position was shortly to be reviewed, and all the new regulations would be embodied in a single Ordinance. The Government did not, therefore, desire to deal piecemeal with details such as formed the subject of the Ordinance..."
>
> (League of Nations, Permanent Mandates Commission, *Minutes of the 11th Session, Geneva, 20th June - 6th July 1927*, p.24.)

528. The actual relations between the Commissioners and the Administrator, as revealed in this incident, may be contrasted with the position as described by Sir Joseph Cook to the Permanent Mandates Commission in 1922. When outlining the powers of the British Phosphate Commissioners he stated that...

> "the Phosphate Commissioners were responsible to the Administrator of the island, and were bound by the ordinary laws and regulations protecting the natives. The Phosphate Commission [*sic*] had been made independent only as a business concern. This had been done so that the Mandatory might be free from the necessity of managing a purely commercial enterprise."

529. The Chairman having referred to "Article 13 of the Nauru Agreement of 1920", Sir Joseph Cook replied...

> "This did not release the Phosphate Commissioners from the ordinary obligations of citizenship, or from the observance of any of the ordinances and laws for the protection of the natives. The Administrator might, at any time, if necessary, interfere to protect the natives, and care had been taken to safeguard native interests by express provisions. It was necessary in this connection to remember that the island of Nauru was 2,000 miles from Australia, and that a large delegation of powers to the Administrator was essential."
>
> (League of Nations, Permanent Mandates Commission, *Minutes of the Second Session, Geneva, August 1922*, 11th Meeting, 7th August 1922, pp.56-7.)

530. Similar statements were made by Australian representatives to the Permanent Mandates Commission and to United Nations bodies: see e.g. League of Nations, Permanent Mandates Commission, *Minutes of the Fifth Session, Geneva, 23rd October - 6 November 1924*, p.144 ("the Commission... was completely subordinate to the Administration"); Permanent Mandates Commission, *Minutes of the Ninth Session, 8th - 25th June 1926*, 14 ("the Commission was always subject to the laws of the Administration in the same way as any other private company"); Commonwealth of Australia, *Report to the General Assembly on the Administration of the Territory of Nauru, 1st July 1947 - 30th June 1948*, p.24 ("So far as the Administration of the Territory is concerned, the Commissioners are regarded as an enterprise subject to the laws of the island").

531. Shortly after the controversy over the Lands Ordinance 1925, the issue arose of the terms on which the mining provisions under the 1921 Ordinance,

which were to apply only for 6 years, would be extended. The British Phosphate Commissioners sought to have the phosphate land vested in them either for the duration of the concession (at that time, 73 years) or at least for a very substantial period. According to Griffiths...

> "The Commission apparently in its laudable desire to protect the interests of the natives, suggested that all phosphate lands should be permanently vested in them at rates less than previously agreed to -- or if the permanent vesting were not practicable, that the land be vested in them for 25 years. A suggestion worthy of medieval times when "Barons ruled the sway" but certainly an anachronism in 1926."
>
> (Telegram, Griffiths to Secretary, Prime Minister's Department, 9 November 1926; Australian Archives, CRS A518 D 112/6/1; Annexes, vol.4, Annex 52.)

532. Dickinson was unperturbed by Griffiths' antagonism and made further proposals on behalf of the Board, pointing out that...

> "it is, of course, necessary in order to satisfy the requirements of phosphate in the partner countries that sufficient mining land should always be available for the operations of the Commission. The Board would, therefore, have preferred that if equitable terms and conditions could now be arranged, under which mining and other land in Nauru would be made available as and when required for the operations of the Commission, the new agreement with the Nauruans should be made for the outstanding period of the concession which has some 73 years to run: but, if it is not desired that an agreement should be concluded for so long a period, it is considered that it would be in the interests both of the undertaking and of the Nauruans if an agreement could be made for a period of, say, twenty five years."
>
> (Memorandum, Secretary of State for the Dominions to the Governor-General of Australia, 29 March 1927, pp.1-2; Annexes, vol.4, Annex 53.)

The communication is urbane in tone: it acknowledges a concern for the interests of the Nauruans, and speaks of the "equities". Yet it seeks, in effect, to dispossess the Nauruans, to acquire complete control over both phosphate and non-phosphate bearing land, and to tie down the Nauruans, possibly for generations, to the terms proposed.

533. The partner Governments appear to have been satisfied with the equity of the measures proposed by the Commissioners. The Australian Government informed Griffiths that the British and New Zealand Commissioners were anxious for the immediate and permanent vesting in the

Phosphate Commissioners of all rights in the phosphate lands. Griffiths replied, on 26 October 1926:

> "Your telegram twentythird October much mutilated but sufficiently intelligible for main principles to be followed glad copy decode by next mail.
>
> I consider the proposal that Nauruans permanently or temporarily be deprived of or dispose of their birthright as suggested is unworthy the serious consideration of a responsible Government and would be fought tooth and nail by the Nauruans.
>
> May I with all respect again point out that the phosphate deposits are owned by individual Nauruans and that the BPC only have the right to exploit the deposits subject to the rights of the owners and that the Nauruans look with confidence to the Australian Govt. to protect their rights."
>
> (Letter Griffiths to the Secretary, Prime Minister's Department, 28 October 1926; Australian Archives, ACT, CRS A518, D 112/6/1; Annexes, vol.4, Annex 51.)

534. The Nauruans, supported by Griffiths, were intent on entering into an agreement which would last for only five years. This was strongly opposed by the Commissioners. Dickinson observed that:

> "While the object of the Nauruans in proposing short period agreements with the Commission is to secure enhanced terms at brief intervals, it is necessary, in order to satisfy the requirements of phosphate in the partner countries that sufficient mining land should always be available for the operation of the Commission."
>
> (Memorandum from the British Prime Minister's Office to the Governor General of Australia, 29 March 1927; Annexes, vol.4, Annex 53.)

In the same Memorandum Dickinson suggested that if it was unacceptable for the agreement to last until the end of the Concession, "it would be in the interests of the undertaking and of the Nauruans if an agreement could be made for a period of, say, twentyfive years" (ibid.).

535. The most detailed account of the negotiations themselves is presented in a Memorandum sent by Mr Harold Gaze, the General Manager, to the Commissioners. It is perhaps significant that Griffiths had left Nauru for Australia on 28 June 1927, another Australian, Newman having taken over the previous day as Administrator. Newman immediately embarked upon talks with the Nauruans regarding the new agreement, but with little initial success, as Gaze recounts:

> "After his first meeting with the Chiefs, Mr. Newman informed me that they were thoroughly imbued with the proposals put forward by General Griffiths, and especially that no agreement should be made for longer than five years and that he would have to gain their confidence before he could expect to make any progress towards the acceptance of our proposals as stated in the provisional memorandum attached to the British Government despatch dated 29 March 1927 to the Commonwealth Government."
>
> **(Board of Commissioners, Memorandum No.96 of 12 September 1927, p.16; Annexes, vol.4, Annex 54.)**

536. Negotiations appear to have been difficult and frustrating.

> "At this stage Mr. Newman expected to secure the consent of the chiefs within a few days, but on the 22nd July they reverted to the proposal for a 5 year agreement and even suggested that 1 year would be better."

537. The manner in which agreement was finally achieved is then set out:

> "On Saturday morning, 30 July, the committee called on Mr. Newman to inform him that their meeting on the previous day had decided:
>
> a) to decline to make an agreement for more than 5 years,
>
> b) to decline a flat price per acre for phosphate land and ask a rental of 3 pounds per acre per annum, with extra payment for trees,
>
> c) that land already held by the Commission should be worked out before leasing further land.
>
> The Administrator refused to ask the Commission to accept these terms and suggested that they state them direct to me. Accordingly a meeting with the committee and Mr. Newman was arranged for the afternoon at the Administration office and I attended with Mr. Thompson and Mr. Thom. Several hours talk ensued as the result of which they abandoned (b) and (c) but we could not shake their determination to make no agreement beyond 5 years. It was evident that Detudamo was their leader and that he was committed to the policy of getting terms revised after 5 years which had been strongly impressed upon him by the previous Administrator. Although Mr. Newman told the committee that adherence to 5 years might delay a settlement for a year and laid stress upon the approval of the three Governments having been given to a long agreement no further progress could be made. It was pointed out to Detudamo that if the price of phosphate dropped after 5 years the royalties might be reduced also if they had an agreement for 5 years only, his reply being that if the Commissioners could not afford to pay as much the Nauruans would then accept less. The only point which appeared to make any impression was my statement that the Commissioners

> could not spend the large sums necessary for new machinery and plant to get more phosphate unless they knew what the phosphate would cost for at least 20 years. Mr. Newman arranged with the chiefs, at our request, for another meeting with us at 10 a.m. the following day, Sunday, as we were to leave Nauru at 11 a.m. per "Dagfre". In the evening I submitted to Mr. Newman a draft clause providing that -
>
>> The royalty of 4d. per ton to the Nauruan landowner(s) shall be adjusted for the second, third and fourth five-yearly periods of this agreement by increasing or decreasing it pro rata to any increase or decrease of the f.o.b. price of Nauru phosphate sold by the Commissioners to the United Kingdom, Australia and New Zealand for the 6th, 11th and 16th years of this agreement compared with such price for the first year of this agreement, at the rate of ½d. per ton increase or decrease of royalty for every 1/- per ton increase or decrease of the price.
>
> He approved this and I asked him to put it to Detudamo as his own proposal to which, if acceptable to the Nauruans, he would endeavour to secure our consent in order to close the agreement. This was done and Detudamo accepted the proposal early on Sunday morning, 31st July, undertaking to bring all the chiefs to the meeting at 10 a.m. ready to sign if we agree to the clause. At the meeting, which was of a formal character and occupied a short time only, an agreement was signed as per copy attached, and we left Nauru shortly afterwards. The terms are in accordance with the proposals of the Board approved by the three Governments, as I did not find it necessary to exercise the discretion given to me by the Board to increase the price per acre and the price for trees. Had the negotiations failed then, however, there is little doubt that higher rates would have been necessary to secure an agreement as the terms for Ocean Island, not then known to the Nauruans, would have led the latter to make further demands, although the circumstances of the two Islands are entirely different... Mr. Newman acted with tact and discretion throughout the negotiations, and I had pleasure in conveying to him the congratulations of the Board."
>
> (Memorandum No.96 of 12 September 1927; Annexes, vol.4, Annex 54.)

538. In the event, although it did not proceed to outright acquisition of the lands, the Lands Ordinance 1927 removed the power of the Administrator to refuse to consent to leases, and left the Commissioners to deal directly with the Nauruan landowners. But it went even further than this, since it gave the Commissioners the right compulsorily to lease phosphate-bearing land, on terms even more elaborately spelt out in the Ordinance. This can be deduced from the comparison between the provisions for phosphate and non-phosphate leases. Section 4(a)(1) of the Lands Ordinance, as amended in 1927, provided:

> "(a) The Commissioners have the right --
>
> (1) to lease any phosphate-bearing land on the island of Nauru, to mine the phosphate thereon to any depth desired, and to use or export such phosphate..."

By contrast, section 5 provided:

> "The Commissioners may, subject to the approval of the Administrator and the owner(s), which approval shall not be unreasonably withheld, lease such non-phosphate bearing lands on the island of Nauru as may be required by the Commissioners for and in connection with the operations of the Commissioners..."

Not only did section 4 confirm the view of the Commissioners as to the depth of mining, and remove the veto power of the Administrator as to leases of phosphate land; it appears to have made the consent of the owners legally irrelevant to the validity of such leases. The machinery of leases continued to be used on Nauru, but both in law and in substance these were compulsory licenses, with no element of choice on the part of individual landowners. These aspects of the Lands Ordinance as amended in 1927 remained in force throughout the period of Australian administration.

539. The practice of the Commissioners under the Ordinance was to lease large areas of phosphate lands for extended periods of time, with rental being paid in a lump sum rather than annually (as the land-owners had requested). In return for certain increases in royalties, the Commissioners acquired, as has been seen, the express right to "lease any phosphate bearing land on the island of Nauru, to mine the phosphate thereon to any depth desired, and to use or export such phosphates" (1927 Ordinance, section 4(a)(1)). In 1920, Dickinson had recommended that the Nauruans be paid a royalty of 6d per ton, which he thought was "adequate compensation". By delaying this payment, and by commencing royalty payments at half the rate which they themselves saw as reasonable, the British Phosphate Commissioners acquired a bargaining position of overwhelming strength, and could represent each increase in royalty to which they agreed as representing a generous concession. They could also use increases in royalties as a means of extending their rights over the phosphate industry. Thus, in 1927, by paying slightly more than the amount they had initially described the phosphate as being worth in 1920, they were able to complete their armoury of privileges.

while avoiding a limitation on the depth of mining which, if adopted, would have had far-reaching implications for the rehabilitation of the lands.

B. CONCLUSION

540. As this account demonstrates, on key occasions where a conflict between the British Phosphate Commissioners and the interests of the Nauruans occurred, it was the Commissioners who prevailed. In 1925 they did so because the Australian Government overruled the Administrator in his support for a limitation on the depth of mining. In 1927 it is fair to say that it was only through the connivance of the newly-appointed Australian Administrator that the Commissioners' interests prevailed. While royalty and leasing payments were gradually increased, these payments were limited and, for most of the relevant period, were less than the payment made at the nearby British colony of Ocean Island at the same time -- a fact which, in 1927 at least, was carefully concealed from the Nauruans.

541. On the numerous occasions when the Permanent Mandates Commission, and later the Trusteeship Council, expressed concern about the role of the British Phosphate Commissioners on the island it was told that the Administrator would look after the interests of the Nauruans, and would legislate in order to do so if necessary (see paragraph 530 above for sample references). The reality was otherwise, as no Australian Administrator after Griffiths took an independent position opposed on any vital issue to the interests of the Commissioners. Other examples of this difficulty are referred to elsewhere in this Memorial: see e.g. paragraph 108 (conflict between needs of Nauruans and of Commissioners in post-war reconstruction; proposal to abolish individual land tenure). Taken together, these incidents powerfully reinforce the submission that the Respondent State acted in breach of the obligations incumbent upon it in the administration of Nauru, and in particular of the trusteeship obligation.

PART IV

CHAPTER 4

THE BRITISH PHOSPHATE COMMISSIONERS' ACCOUNTS AND AUSTRALIAN RETICENCE: INFERENCES TO BE DRAWN

Section 1. The Australian Position on Financial Reporting

542. A necessary element of the relationship between an Administering Authority and the United Nations, given the significance of the supervisory role of the latter over the former, was the obligation to provide information about the Territory and its administration. This is made clear in Articles 87(a) and 88 of the United Nations Charter, which require annual reports to the General Assembly on the conditions in each trust territory, based on a questionnaire to be formulated by the Trusteeship Council. Those reports were not limited to the government or administration of the territory, but extended to social and economic conditions. Article 5(1) of the Trusteeship Agreement for Nauru implicitly affirmed that requirement.

543. Despite this clear obligation, the information provided to the League of Nations and to the United Nations with respect to Nauru was limited, and deliberately so. It was argued by Australian representatives that no further information was required, since the mining operations were essentially separate and distinct from the issue of Australian compliance with the Trusteeship. For example at the 11th Session of the Trusteeship Council in 1953 when the Annual Report on Nauru was being examined, Mr Loomes of Australia said:

> "In regard to paragraph 9 of the draft recommendations, I would recall to the Council that during the course of the general debate on Nauru I suggested (472nd Meeting) that it would be both improper and undesirable for the Council to adopt too inquisitorial an attitude into the operations of commercial concerns carrying on business in the Trust Territories. My delegation adheres to the position it stated in the debate, and for the reasons that I have stated must vote against the inclusion of paragraph 9 in the recommendations of this Council. We feel that this proposal raises important questions of principle, not only as to the

> desirability of adopting such an attitude with regard to commercial undertakings but also as to the extent of the powers and functions of the Trusteeship Council. I feel that the Council's real interest lies in the supervision of the fulfilment of the Trusteeship Agreement and the promotion of the political, economic, social and educational advancement of the indigenous inhabitants. The raising of the financial means necessary for the achievement of these objectives is, we feel, a matter which has to be left to the discretion of the Administering Authority. The advantages which the inhabitants of Nauru derived from the operations of the British Phosphate Commissioners, have, I think, been made very clear to the Council, and this should leave no doubt that the Commissioners have made, and will continue to make, adequate contributions to the administration of Nauru and to the welfare of the indigenous inhabitants."
>
> (*Trusteeship Council Official Records, 12th Session, 16 June - 21 July 1953*, 479th Meeting, 13 July 1953, p.309.)

544. Similarly at the 18th Session of the Trusteeship Council in 1956 the Australian representative stated:

> "With regard to the subsidiary question of whether the Trusteeship Council received sufficient information about the operations of the British Phosphate Commissioners, the Administering Authority's position was clear. The Council was fully entitled to information concerning the quantity of phosphate produced on the island and its destination and value, and that information was submitted to the Council. It was to be found in Appendix VII and Appendix XIII of the Annual Report. The Administering Authority felt that in providing that information it was fully complying with Article 5 of the Trusteeship Agreement. The British Phosphate Commissioners operated not only in Nauru but also in Ocean Island and Christmas Island, which were not the concern of the Trusteeship Council, and it would be impracticable to present completely separate information relating to Nauru phosphates alone. The Administering Authority could not emphasise enough its belief that the Council did not need such information and the disclosure of confidential accounts of the Commissioners in order to perform its task effectively. The royalty rates paid to or for the direct benefit of the Nauruans are in no way dependent on or influenced by the prices received for phosphate."
>
> (*Trusteeship Council Official Records, 18th Session, 7 June - 14 August 1956*, 714th Meeting, 26 June 1956, pp.112-113.)

545. Again, the Official Records of the Trusteeship Council for the 22nd Session in 1958 contain the following statement by the Australian representative:

> "Those who had requested even more detailed information than that presented might be reminded that the British Phosphate Commissioners were responsible not only for the phosphate industry on Nauru but for similar undertakings in other places. Many items in their accounts were common to their activities as a whole and it would be impossible to break down those common costs and attribute them to one or another specific area without a very complex and largely hypothetical system of cost analysis. Moreover, no case had been made for the publication of confidential information relating largely to the commercial operations of the Commissioners in States or territories over which the Council could have no jurisdiction or responsibility. Indeed, the publication of such information with regard to an industrial undertaking in a Trust Territory might impede the proper development of that territory's economic resources."
>
> (*Trusteeship Council Official Records, 22nd Session, 9 June - 1 August 1958*, 896th Meeting, 18 June 1958, pp.46-47.)

546. The non-production of accounts to the Permanent Mandates Commission and the Trusteeship Council, despite their repeated requests, was not the result of any lack of appreciation of the importance of those accounts. This is shown by the following internal minutes of the British Phosphate Commissioners:

> **"Minute No. 683**
>
> REQUEST BY UNITED NATIONS FOR SEPARATE ACCOUNTS FOR NAURU
>
> Mr Halligan expressed the view that the Trusteeship Council's request for separate accounts for Nauru would probably be endorsed by the General Assembly and queried whether the partner governments would comply.
>
> All Commissioners opposed any suggestion that they should be supplied and held the view that U.N.O. is not entitled to such information but only to information concerning royalty payments to Nauruans."
>
> **"Minute No. 823**
>
> Reports by the General Manager in Memoranda Nos 208 and 216 were noted.
>
> 1. *British Phosphate Commissioners Accounts*
>
> Agreed that pressure for further financial information regarding the operations of the Commissioners at Nauru should be resisted."
>
> (Annexes, vol. 4, Annex 58. Mr Halligan was a former Secretary of the Australian Department of Territories who later became a Commissioner of the B.P.C.)

Section 2. Criticisms of the Australian Position

547. This persistent reticence was the subject of persistent criticism. The position at an early stage of the United Nations' treatment of the issue was summarized in the 1952 Report of the Trusteeship Council:

> "At its fifth session, the Council had requested the Administering Authority to furnish in the next annual report full information on all operations of the British Phosphate Commissioners, including the financial accounts.
>
> At its seventh session, the Council had expressed the view that the restoration to full production of the phosphate industry had been of general benefit to the Territory, but had noted that the Council remained handicapped in its appraisal of economic conditions because of the absence of information which would show, in particular, the separate financial operations of the British Phosphate Commissioners in respect of Nauru, and the actual prices received for phosphate as compared with world market prices.
>
> Endeavouring to learn the costs of phosphates landed in Australia and New Zealand from various sources, the Visiting Mission was told by the general manager of the industry that it was unlikely the Commissioners could supply the information requested.
>
> At its eighth session, the Council had reiterated that it remained handicapped in its appraisal of economic conditions because of the absence of information which would show, in particular, the separate financial operations of the British Phosphate Commissioners in respect of Nauru, and the actual prices received for phosphate as compared with world market prices.
>
> (General Assembly Official Records, 7th Session, Supplement No. 4, *Report of the Trusteeship Council* (1952) p.260.)

548. Criticisms came also from individual representatives in the Trusteeship Council. Two examples of these may be cited.

549. In 1950, the representative of the Philippines...

> "considered that the Council was handicapped in the appraisal of conditions in the Territory because of lack of information and particularly that relating to the operations of the British Phosphate Commissioners. He believed that pending more detailed information the Council might reiterate its recommendations of last year. Further light was desired on the finances of the British Phosphate Commissioners so that the Council might be in a position to judge to what extent the industry was being operated in the interest of the people and in particular, whether the people were receiving an equitable share of the returns from the

> exploitation of the only natural resources of the Territory. The principal difficulty of the Council arose from the fact that the financial accounts of the British Phosphate Commissioners covered their operations both in Nauru and the Ocean Islands, and it was impossible for the Council to separate these accounts so that the position in Nauru alone would become clear. The Council had no information, moreover, as to the actual price received by the Commissioners per ton of phosphate and as to how this price compared with the world market price. He considered that these were questions of great importance, since the British Phosphate Commissioners were a government-established monopoly and also since the three Governments concerned had a monopoly on the entire production irrespective of prices that might be obtainable elsewhere.'
>
> (*General Assembly Official Records*, 5th Session, Supplement No. 4, *Report of the Trusteeship Council* (1950) p.144).

550. The Guatemalan delegate to the Trusteeship Council at its 22nd Session also referred to...

> 'the importance of the Council's obtaining from the Administering Authority information concerning the internal functioning of the undertaking administered by the British Phosphate Commissioners and the price received for the sale of Nauruan phosphates. The special representative had said that it was not usual for such a request to be made concerning a private industrial or commercial undertaking in a Trust Territory. The British Phosphate Commissioners, however, constituted a body which was in a class by itself; it could not be called a private undertaking and it accounted for almost the entire industrial activity of the Territory. Hence it was natural that the Council should be concerned over the Commissioners' failure to appoint Nauruans to responsible posts. It could not judge the validity of the Commissioners' statement that no Nauruans were qualified to fill such posts unless it knew something about the internal functioning of the undertaking. Similarly, it could not satisfy itself on the vital question of whether the Nauruans were receiving a fair return on the exploitation of the island's phosphate beds unless it had information concerning the independent financial operations of the Commissioners and the prices received for the phosphates. The special representative had explained that as the same undertaking also exploited the phosphate deposits on Ocean Island and Christmas Island it could not give a separate accounting for the phosphates extracted on Nauru without completely reorganizing its system of bookkeeping. That answer, which in effect subordinated the interests of the Nauruan community to the convenience of the undertaking, was not acceptable to his delegation. The Administering Authority insisted that the royalties and other benefits the Nauruan community received from the Commissioners in return for the privilege of exploiting the phosphate beds were reasonable and were not affected by the sale price of the ore. Yet is was significant that capital had not

> been invested in a single permanent undertaking which would enable the Nauruan community to develop new sources of income."
>
> (*General Assembly Official Records*, 22nd Session, 894th Meeting, 16 June 1958, pp.31-2.)

Section 3. The Accounting System for Nauru

551. In fact detailed accounts were made available to the three partner governments from year to year. Annexes, vol.4, Annex 66 contains a copy of the Confidential Accounts which was available to the Respondent State in 1965. There were a number of funds into which money was assigned without any intimation of that fact to the relevant United Nations bodies. These were the Ships Replacement Fund, the Marine Insurance Fund, the Depreciation Fund, the Moorings Fund, the Development Fund, the General Fund, the Contingencies Fund. The state of the British Phosphate Commissioners accounts is further analysed in the Report by Mr. K.E. Walker set out as Appendix 2.

552. Thus there was in effect a dual reporting system -- one for the League of Nations and the United Nations, and one for the partners in this commercial venture. Requests repeatedly made in the Trusteeship Council and the Permanent Mandates Commission for an amplification of the accounts could well have been answered by the Respondent State from the extensive information contained in these accounts.

553. Statements were repeatedly made by the Respondent State to the effect that, because of the nature of the operation and the commonalty of costs, it was impossible to isolate the British Phosphate Commissioners accounts relating only to Nauru. In 1954, to take only one example, the Trusteeship Council noted...

> "the statement of the Administering Authority that the operations of the British Phosphate Commissioners at Nauru and Ocean Island are conducted as one undertaking and there are no separate financial operations respecting Nauru, and requests the Administering Authority, as it did at its twelfth session, to make every effort, in agreement with the British Phosphate Commissioners, to provide information concerning the separate financial operations of the British Phosphate Commissioners in respect of Nauru in its next annual report."
>
> (*Report of the Trusteeship Council covering the Period from 22 July 1953 to 16 July 1954* (1954) p.271.)

554. But the Australian response continued to be negative. In its "next annual report" on Nauru, the Administering Authority stated:

> "It is the desire of the Administering Authority to continue to co-operate and assist the Council, but, in view of the impracticability of establishing and maintaining separate accounts for Nauru, as explained at the Fourteenth Session, and in the absence of any indication by the Council of the manner in which the keeping of separate accounts would assist the Administering Authority in carrying out its responsibilities, benefit the Nauruans or assist the Council in carrying out its functions, it is felt that to alter the present arrangement, which affords the Council sufficient data to enable it to judge how faithfully the Administering Authority is fulfilling the Trusteeship Agreement, would serve no useful purpose.
>
> It has been made quite clear that the selling price of phosphate does not influence the payments to the Nauruans or the payments towards the administration of the Territory."
>
> (Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of Nauru, 1st July 1953 - 30th June 1954* (1955) p.36. See also N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970, pp.126-7.)

555. In fact there was a separate accountant on Nauru. Combined costs could not in practice have been compiled without individual cost information for each island. As Mr. Walker's Report (Appendix 2) demonstrates, separate on-island costs were accounted for throughout the period of Australian administration, and it was at all stages possible, in accordance with accepted accounting conventions, to attribute "off-island" costs as between Nauru and Ocean Island so as to arrive at a separate account of operating costs and returns for the two islands. This was not done not because it was impossible, but because it suited the Respondent State not to do it.

556. In the detailed balance sheet submitted to the partner governments, fixed assets are analysed by class, reserves are detailed and stocks and fixed assets are analysed by island (i.e. Ocean Island or Nauru). Historical data is given in tabulated form for the trading account. Cumulative results are shown for groups of years -- for the first five years, the next five years on a year by year basis. These five year and ten year summaries provide an overview of the operation for overall examination. Comparative costs are given on a per ton basis for each of the elements in the trading account and

sales values are analysed into sales to partner countries and non-partner countries.

557. Additional data made available in these accounts include a statement of phosphate purchased from outside sources for Australia to supplement supplies from Nauru and Ocean Island, showing source of additional phosphate, weight, etc. Capital expenditure approved from the development fund is shown in detail, together with a record of funds spent to date on a project by project basis and a basic form of funds statement -- or rather a statement showing the movement in the balance sheet items over the entire period of operation.

Section 4. Significance of the Failure to Report

558. The failure of the Respondent State to produce adequate accounts has significance at a number of levels. The first and most obvious level is evidentiary. Although the onus is on the Applicant State, as such, to establish its case of breach of the trusteeship obligation, and of general international law, on the part of the Respondent State, it must not be forgotten that the Applicant stands in the place of and represents the real beneficiary of the Trusteeship arrangement, the Nauruan people. It goes a considerable way towards establishing a breach of trust to establish that the trustee has persistently and as a matter of deliberate policy sought to conceal what it is doing in the administration of the trust. There is no need to conceal something if disclosure will be innocuous.

559. But the matter is more fundamental still. A major basis for non-disclosure was an artificial conception of the separateness of the mining operation conducted by the British Phosphate Commissioners in the interest of the partner Governments, especially Australia. The accounting records presented an image of two separate domains, the fiscal domain of the mining operation and the British Phosphate Commissioners, and the residual domain of the Nauruan people. There was thus a failure to consider the real interests of the beneficiary of the trusteeship, the Nauruan people -- a sort of fiscal marginalization, so that the people lived, to a large extent, as dependents of a foreign mining concern on land progressively alienated from them.

560. This characteristic was acutely analysed by the United Nations Visiting Mission in its Report on Nauru in 1962:

> "50. There are three estates in Nauru. The British Phosphate Company lives and operates in a world of its own. The Administration is aloof and strangely separate from the Local Government Council. Relations amongst these three authorities are usually fairly cordial, but they meet as different and distinct bodies each with its own separate interests and its own separate obligations and aims. The result is that the conscientious leaders of the Nauruan people, with no participation in the exploitation of the one physical asset in the island, and with their duties limited to comparatively minor communal questions, have not been given the experience of responsibility to prepare them for the pressing challenge and the hard decisions of the future.
>
> (United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, *Report on Nauru*, *Trusteeship Council Official Records*, 29th Session, 31 May - 20 July 1962, Supplement No. 2, pp.5-6.)

PART IV

CHAPTER 5

PROPOSALS FOR RESETTLEMENT AND REHABILITATION: IMPLICATIONS OF THE AUSTRALIAN APPROACH

Section 1. Introduction

561. The issue of the long-term future of the Nauruan people was raised at a relatively early stage of the Australian administration of Nauru, and became ever more pressing as the mining operations continued and increased in scale. The Respondent State itself acknowledged the problem, giving a series of commitments to deal with it. For example in 1949 the Australian representative noted that:

> "The phosphate deposits will be exhausted in an estimated period of seventy years, at the end of which time all but the coastal strip of Nauru will be worthless. The Australian Government is alive to the possibility that the Island may not then provide a satisfactory home for the indigenous population and that it may be necessary to give the Natives an opportunity to transfer to some other island."
>
> (*Report of the Trusteeship Council, August 6 1948-July 22 1949, General Assembly Official Records*, 4th Session, Supp. No. 4 (1949) p.74.)

562. The Australian Government thus seems to have accepted that there was a responsibility to provide an alternative home for the Nauruans -- or rather, as the Australian representative stated in 1957, "that the Administering Authority had undertaken to provide for their future" (*Trusteeship Council Official Records*, 20th Session, 20 May - 12 July 1957, p.87). This commitment was also expressed by Australian authorities in less formal ways. The Acting Minister for External Territories, Mr Chambers, was reported in the Brisbane *Telegraph* as submitting to the Prime Minister, Mr Chifley, that Australia had a responsibility to provide a new island for the steadily increasing native population as work on the extraction of phosphate deposits had reduced the island to a "barren skeleton of coral pinnacles" (see Australian Archives, ACT, CRS A 518, Item DR 118/6 Pt 1). And the then Australian Prime Minister, Sir Robert Menzies, before his attendance at the

Trusteeship Council in June 1961, was reported by the Melbourne "Herald" as having said:

> "Being in the course of using the resources of Nauru, with New Zealand and the United Kingdom, we recognize an obligation not merely to leave them to their own devices but to accept a national responsibility in the matter along with New Zealand and the United Kingdom.
>
> This involves either finding an island for the Nauruans or receiving them into one of the three countries, or all of the three countries.
>
> We stand willing to honour the implicit obligation of our joint tenancy, but before any final step is taken we will pay great regard to the views of the Nauruans."
>
> (Cited in a Memorandum submitted by the Nauru Local Government Council to the 1965 Visiting Mission: *Trusteeship Council Official Records*, 32nd Session, 2 May - 30 June 1965, Supp No 2, Annex 1, p.13.)

563. Thus, well before the independence talks, the issue was being presented in terms of a choice between the alternatives of rehabilitation or resettlement, with the Respondent State having the responsibility to assist the people both in making and in giving effect to that choice.

564. In earlier years resettlement had been regarded as a secondary and distant possibility, since it was generally expected that rehabilitation of the land would be feasible. But the longer the issue was postponed, the more difficult it became. By the late 1950s, given the prevalent (but never properly investigated) view that rehabilitation was not feasible, the resettlement alternative progressively assumed greater importance.

565. However, even if the Nauruans were prepared to overlook their deep attachment to their own island, resettlement was fraught with difficulties. Where was it to occur? What would be the status of the resettlement territory? What would be the status of Nauru after resettlement? Would the Nauruans be expected to be assimilated into the surrounding community, and to lose their identity and status as a people? In the event none of the resettlement proposals (involving certain Australian off-shore islands) materialized. On 22 November 1967, the Head Chief, Mr Hammer DeRoburt, informed the Trusteeship Council at its 1323rd Meeting that, "In the end the people of Nauru had come to the conclusion that the Island of Nauru, to which they had always belonged, must be their permanent homeland." (*Trusteeship Council Official Records*, 13th Special Session, 22-23 November 1967, p.4.)

566. The difficulty was that, having supported resettlement as a method of discharging its trusteeship responsibility, and after making initial investigations into the options for rehabilitation, the Australian Government ultimately failed to fulfil its responsibility for the alternative, an alternative accurately described by the General Assembly as "restoring the Island of Nauru for habitation by the Nauruan people as a sovereign nation". (Resolution 2111 (XX), 21 December 1965).

Section 2. Resettlement Proposals

567. Resettlement first became a major issue after World War Two. There seem to have been various motives for this. For example, in a minute the Secretary to the Department of Territories of 4 June 1953 observed:

> "The General Manager of the British Phosphate Commissioners, seems to be fairly keen on the idea of acquiring another island and resettling the Nauruans, but he has not put forward any suggestion that is worth following up. Personally, I gathered the impression in discussion with the General Manager, that he is pushing the idea more with the objective of getting the Nauruans out of the way than the desire to find the best avenue for their future when the phosphate cuts out on the Island."
>
> (Memorandum, "The Future of Nauruans", 4 June 1953, Australian Archives, ACT, CRS, A518, Item DR 118/16; Annexes, vol.4, Annex 60.)

569. A feature of the early plans for resettlement was that tended to envisage the resettlement of the Nauruans as individuals, in Australia or elsewhere. This was the approach taken in a Departmental minute dated 5 November 1953 by the Secretary to the Department of Territories to the Minister, which bears the Minister's endorsement of his general agreement with the proposal:

> "The social development of the Nauruans is tending more and more towards the European pattern. The longer they stay on the island of Nauru working in and for European enterprise, and the more our education activities develop them along and fit them for the European way of life, the more this trend will continue and the less likelihood there will be of the problem of their resettlement being met by transfer to an isolated island life. It is considered that the solution to the Nauruan resettlement problem lies not in finding another island Nauru to which they could be transferred as an entire community, but in steadily educating them to the stage where they can fit into the economic and social life of Australian

Territories, after the European manner, and progressively finding opportunities within those Territories to which they could transfer, according to their several capacities and wishes. From climatic and opportunity aspects, Papua and New Guinea seem to offer the best prospects, although possibilities in Australia itself cannot be dismissed altogether.'

(Australian Archives ACT CRS A518, Item DR118/6 PT.1; Annexes, vol.4, Annex 62.)

570. The memorandum went on to specify certain practical courses of action.

'The broad lines of approach, which it is suggested be adopted, are:-

(a) To continue with education and employment policies on Nauru directed to training and fitting the Nauruans for social and employment opportunities after the European manner. As this advances, so will the desire of Nauruans for assimilation in Australian Territories.

(b) As part of this education, a conducted tour be arranged each year for four selected Nauruans to Australia and Papua and New Guinea, or to Papua and New Guinea only, to enable them to get first-hand knowledge of conditions in those countries. The funds for these tours to be provided from the Nauru Royalty Trust Fund.

(c) The Department, in co-operation with the Papua and New Guinea Administration and the Nauru Administration, to be charged with the responsibility of finding individual or group settlement and employment opportunities outside Nauru, for those Nauruans who express the wish to transfer and who are fit to accept and take proper advantage of the opportunities offering.

(d) In due course, the Local Government Council to be empowered, with the approval of the Administrator of Nauru, to make a grant to any adult male Nauruan who transfers permanently to a place outside Nauru, for the purposes of assisting such Nauruan to meet the costs of removal of himself, family and personal effects, and to establish a home for himself and his family in the place to which he has transferred. Such grant to be paid out of the Long-Term Investment Fund.

If we settle on our broad lines of approach, the details will work out as we proceed.

If you agree that these are the only practical lines of approach at the moment, it will be necessary for you to decide whether you will declare it to the Nauruans as a firm policy. I would be inclined not to do so because I believe that it would

> immediately provoke those who are at present advising the Nauruans, to organise open opposition, irrespective of any fair-minded consideration of the realities.
>
> I believe that a policy of encouraging and helping assimilation can be pursued by us steadily and unostentatiously and that its prospects of success will not be affected if we do not openly disclose it to the Nauruans as a deliberate policy. Assimilation must develop from spontaneous choice by individual Nauruans and from opportunities presented. We can steadily help both of these to develop.
>
> For the time being, however, I believe our best interests would be served by playing along with the Nauruans on the idea of a new Nauru. For that purpose, I think we should reply along lines that put the problem back into the lap of the Nauru Local Government Council, by asking questions which it is essential we know the answers to before we can even think about moving."
>
> (Australian Archives, ACT, CRS A518, Item DR118/6 Pt.1; Annexes, vol.4, Annex 62.)

571. But there were other reasons than "playing along with the Nauruans" for investigating the prospect of "separate resettlement":

> "A further advantage in still pursuing the idea of acquiring an island or part of a Territory for the resettlement of Nauruans, is that we may be forced ultimately to need such an area as a second string, either because some Nauruans will not or cannot be assimilated or that we are left eventually with a residue which must be resettled quickly."
>
> (Ibid.)

572. The Minister minuted on the memorandum as follows:

> "I agree with the general lines of this memorandum, although I would qualify or amend some of the statements in it.
>
> For the guidance of the dept. my minute of 5th June 1953 (folio 12) may still be regarded as present policy. In practical terms this means that for the next five years we proceed on the assumption that works, services and facilities will be required on Nauru for another generation in respect of a population no less than the present Nauruan population; that during this generation we proceed with the advancement of the Nauruans to the full extent of their capacity to benefit from education, that the eventual condition of the Nauruans will depend on the results of these efforts at their advancement; that the prospect of their eventual transfer to another home is a real prospect but the exact conditions of such a transfer will depend primarily on what social and cultural ... [word illegible]... takes place among the Nauruans themselves. The idea of an island home is not dismissed but is made a subject for thinking by the Nauruans themselves. The suggestions

> made in the passage I have marked on page 2 [the proposal marked (c)] of this memorandum can be put into effect at once. At a subsequent stage we can proceed, if it is thought desirable, with some of the other suggestions made in the memorandum."
>
> (ibid; Annex, vol.4, Annex 62.)

573. Throughout this period, the Australian Government was on record as accepting an obligation to assist financially with resettlement.

574. For example, in 1956 the Respondent State gave an assurance that financial assistance would be provided in relation to re-settlement. The Trusteeship Council in its "Recommendations and Conclusions" on Nauru:

> "welcom[ed] the assurance given by the Administering Authority that, whatever funds will be needed for the possible resettlement of the Nauruans, these funds will be forthcoming as and when required, and that all the necessary assistance, whether it be special training or technical assistance, will be amply provided."
>
> (*Report of Trusteeship Council 23 July 1955-14 August 1956, General Assembly Official Records* 11th Session Supp. No. 4 (1956) pp.325.)

575. Similarly in 1962 the Trusteeship Council stated that:

> "It shares the view of the Visiting Mission that the strongest obligation rests with the Governments of the countries which have benefited from low price, high quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the costs of whatever settlement scheme is approved for the future home of the people of Nauru. In this connexion, it takes note with satisfaction of the declaration of the Administering Authority that ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance."
>
> (*Report of Trusteeship Council 20 July 1961-20 July 1962, General Assembly Official Records* 17th Session Supp. No. 4 (1962) p.41.)

This undertaking was reaffirmed in 1963 (*Report of Trusteeship Council 20 July 1962 - 26 June 1963, General Assembly Official Records* 18th Session, Supp. No. 4 (1963) p.28). The question however was, what was going to be done to give effect to it.

576. In 1959 representatives of the Department of Territories, the Nauruan community and the British Phosphate Commissioners met, at which point Australia put forward what Williams and Macdonald describe as a "crude assimilationist policy" (M. Williams & B. Macdonald, *The Phosphateers*, Melbourne University Press, Melbourne, 1985, p.465). Nauruans were to be given full citizenship in either New Zealand, the United Kingdom or Australia, it being expected that most would come to Australia. This idea was rejected by the Nauruans, on the basis that it would involve the loss of their identity as a people.

578. At the meeting of the Trusteeship Council in May/June 1963, the Australian Government, through its Special Representative, informed the Council that:

> 'If an area was chosen which was now Australian Territory and which could be made available, the basis of the administrative arrangement would be that, subject to the resettled Nauruans accepting the privileges and responsibilities of Australian citizenship, they should be enabled to manage their local administration and to make domestic laws or regulations applicable to their own community.'
>
> (*Trusteeship Council Official Records*, 13th Session, 29 May - 26 June 1963, p. 6.)

580. The Nauruans were themselves anxious at one stage to resettle on another island, as they feared that they would not be able to continue to live on Nauru. But, as has already been recounted in paragraphs 159-174 above, no agreement could be reached on the resettlement option. At the 1964 talks the Nauruan delegation summarized their position in the following terms:

> 'We submit again that the main need for resettlement arises out of the physical destruction of the island and its attendant problems. Four-fifths of our island is phosphate-bearing and therefore in the end that much will be destroyed...
>
> We feel that we cannot secure a reasonably happy and satisfactory future on your terms for resettlement on Curtis Island and we have decided on behalf of our people that the idea should forthwith be abandoned...
>
> Your representatives pointed out, and we had noted, that the same Australian attitude would apply to all its off-shore islands irrespective of their distances from the mainland.
>
> We are left therefore, with no option but to look to our own island for a permanent future.

> We will remain on Nauru."
>
> ("Summary of the Views Expressed by the Nauruan Delegation at the Conference in Canberra July-August 1964" pp.4-5; *Annexes* vol. 3, Annex 1, pp.4-5. See para. 173 for the full text of the statement.)

Section 3. Rehabilitation Proposals

585. The effect of the failure of the resettlement proposal was that the rehabilitation issue revived. The Nauruan delegation lost no time in pointing this out:

> "As the Nauruans, the Administering Authority and the U.N. Trusteeship Council have all agreed that there would always be people remaining on Nauru even if the majority were resettled elsewhere, and as it was further agreed that Nauruans would not be forced to leave against their will, the Nauru Local Government Council thinks it is important for the livelihood of such people that lands which have been denuded of their natural soil for phosphate mining should be reclaimed.
>
> As the entire Nauruan community now will have to make the island their home forever because they cannot expect to retain their own nationality on any Australian islands, the question of rehabilitating the quarried lands, in full, has become imperative and most urgent.
>
> If the lands are not rehabilitated, the idea of a permanent future for our people on the island will certainly be doomed to failure.
>
> We hope the Administering Authority will not take advantage of the situation to force on us acceptance of Australia's unfavourable terms for resettlement."
>
> (id., p.5.)

586. The view that, in the circumstances that had occurred, the trusteeship obligation carried with it an obligation with respect to the rehabilitation of the lands, was supported by the General Assembly. In particular in Resolution 2111 (XX) of 21 December 1965 the General Assembly, noting the inability of the Respondent State to satisfy fully the Nauruans' conditions that they should be able to resettle as an independent people and have territorial sovereignty in their new place of residence, recommended that "immediate steps be taken by the Administering Authority towards restoring the Island of Nauru for habitation by the Nauruan people as a sovereign nation". (See Annexes, vol.4, Annex 15.)

587. Similarly Resolution 2226 (XXI) of 20 December 1966 recommended that the Administering Authority should "take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation". (Annexes, vol.4, Annex 16)

588. On the other hand the Agreed Minutes at the end of the 1965 talks recorded the following with respect to rehabilitation:

> "The Nauruan delegation stated that it considered that there was a responsibility on the partner Governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian Delegation was not able on behalf of the partner governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and cost of which were unknown and the effectiveness of which was uncertain"
>
> (1965 Talks, Annexe L, "Summary of Conclusions"; Annexes, vol.3, Annex 2.)

589. In an attempt to resolve this impasse, it was agreed to establish an independent technical committee to consider rehabilitation. This was the Davey Committee, comprising Mr G.I. Davey (Chairman), Professor J.N. Lewis and Mr W.F. Van Beers, which was appointed late in 1965 by the Australian Minister for Territories. The members of the Committee were mutually acceptable to the Nauru Local Government Council and the Respondent State. The Committee was directed, *inter alia*, in the Terms of Reference:

> "To examine whether it would be technically feasible to refill the mined phosphate areas with suitable soil and/or other materials from external sources or to take other steps in order to render them usable for habitation purposes and/or cultivation of any kind."

590. The Davey Committee were given a rather short time in which to prepare and present its report. In particular there was no time available to organise any trial projects or tests. The Committee thus relied entirely on information as to the composition and formation of the pinnacles obtained from British Phosphate Commissioners engineers with experience on the island. The same situation applied in regard to Nauru's water resources. Nonetheless the Committee's Report (Annexes, vol. 3, Annex 3) took the view that there were real prospects for rehabilitation at least to a certain level. The Report emphasised the need for water storage and proposed the construction of a large reservoir in one of the natural depressions on

Topside, as part of an overall program of rehabilitation and water and land management. For a more detailed account of the Davey Committee's work see paragraphs 178-184 above.

591. Despite its earlier acceptance of a obligation to take appropriate steps to ensure the long-term future of the Nauruan people, Australia failed to act on the recommendations of the Davey Committee, or for that matter of the General Assembly. Instead, as discussions with respect to the future of the phosphate industry and the timetable for independence of Nauru assumed ever greater importance, it sought to extract from the Nauruan leaders, as a price for granting self-government and control over mining, the abandonment of their claim to the rehabilitation of the already worked-out lands. The Australian posture at this stage involved at least a tacit acknowledgement that it would otherwise have been necessary to engage in a serious rehabilitation programme. That reflected the earlier explicit Australian acknowledgements as to resettlement. The crucial question is then whether the grant of independence and control over the phosphate, on the terms negotiated in 1967, carried with it, either by express agreement of the Nauruans or otherwise, the implication that Australia was relieved of the obligation to rehabilitate the lands.

PART IV

CHAPTER 6

THE SIGNIFICANCE OF THE TRANSACTIONS SURROUNDING INDEPENDENCE

Section 1. The Respondent's Position

592. It has been the consistent position of the respondent State that it regards "the comprehensive Phosphate Agreement concluded prior to independence as a just settlement that cleared the partner governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru": see e.g. Note No.4/88 of the Australian High Commissioner to the Department of External Affairs of the Republic of Nauru, 3 February 1988 (Annexes, vol.4, Annex 80). But there is no document of any kind embodying this so-called "settlement". On the contrary all the records indicate the absence of any such settlement.

Section 2. Nauruan Insistence on the Rehabilitation Claim in the Negotiations Leading to Independence

593. At the talks leading to the Nauru Phosphate Agreement, the Administering Authority stated that in its view the financial arrangements that would be made would be sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or resettlement. But the two benefits the Nauruans received -- independence and control over the phosphate industry -- were no more than they were entitled to. Indeed those benefits were only obtained at a price, as is set out in detail in paragraphs 127-137 above. In effect the Administering Authority was claiming that the rehabilitation of the lands already worked out by their instrumentality, the British Phosphate Commissioners, substantially for their own benefit, should be paid for out of the revenue from future mining. The point was, however, that they had failed to make any provision for such rehabilitation themselves.

594. During the 1967 Talks, the Nauruan delegation drew attention to this aspect more than once. For example, Head Chief DeRoburt in the discussions on 18 May 1967 observed that the Nauruans had always had independence as a basic aim and said that he "was disturbed that in the current talks the Partner Governments seemed to want to protect their interests in the phosphate industry before proceeding to the consideration of the political settlement" (Nauru Talks 1967 p.38; Annexes, vol.3, Annex 5). The Secretary's reply was that the Joint Delegation was not in a position to talk about political matters at that stage. "What the Joint Delegation wanted" he said "was a clear-cut position on the phosphate issue" (id., p.39).

595. The opposing positions of the parties on the rehabilitation issue were stated in the following terms.

596. The Governments' position on rehabilitation was stated as follows:

> "On the question of rehabilitation the Partner Governments maintained that it was not for them to decide what should be done for rehabilitation; this was the decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wished within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation."
>
> (Nauru Talks 1967, p.56; Annexes, vol.3, Annex 5.)

597. In response, the Nauruan position, as stated by Head Chief DeRoburt, was consistently along the following lines:

> "As the Island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed... If the governments claim that their proposals [should] be fully adequate for the present and future needs of the Nauruans then we feel that it is up to *you* to try to convince us on this point by giving whatever details you feel appropriate."
>
> (id., p.82 (emphasis in original).)

Similarly the Nauruan delegation stated:

> "We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or re-settlement."
>
> (id., p.112.)

598. The draft proposals of the Joint Delegation to the Nauruans referred specifically to rehabilitation:

> "Rehabilitation
>
> 9. The partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement."
>
> (id., p.160; Annexes, vol.3, Annex 5)

This clause, one of the most important among the proposals of the partner governments, was dropped in the Final Agreement.

599. In their statement at the 1967 talks the Nauruan Delegation asserted categorically that while the Nauruans were prepared to take financial responsibility for rehabilitating land mined in the future, the partner Governments must take responsibility for rehabilitation resulting directly from their mining operations, and must restore the mined areas whether they had provided for this in the past or not (Nauru Talks 1967 p.111; Annexes, vol.3, Annex 5.).

600. At one stage in the talks, on 14 April 1967, the Australian Chairman attempted to place upon the Nauruans the responsibility for rehabilitation, in terms that "on rehabilitation you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people." In response the Nauruan position was formulated in these terms:

> "Before going any further the Nauruan delegation would like to correct what appears to be a misconception of the Partner Governments about our attitude to rehabilitation of the mined areas on Nauru. A few days ago (on 14th April) the Chairman re-stated the Governments' position that in your view the financial arrangements would be 'sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or re-settlement'. We do not agree with your attitude on this matter (for reasons we shall give later) but at least we understand what you are saying.

> However the Chairman then said 'on rehabilitation, you (the Nauruans) have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people'. This is NOT a correct statement of what we have been saying. It is correct only regarding areas mined *in future*. The Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined (about one third of the island) rests with the Partner Governments who cannot divest themselves of this responsibility merely by saying that they will not accept it."
>
> (id., p.140; Annexes, vol.3, Annex 5.)

601. This was made clear again in the Phosphate Proposals of the Nauruan Delegation:

> "We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement."
>
> (1967 Nauru Talks, p.112; Annexes, vol.3, Annex 5.)

602. In the event the Nauru Island Phosphate Industry Agreement of 14 November 1967 was silent on the question of the rehabilitation claim. (See Annexes, vol. 3, Annex 6 for the text of the Agreement.)

Section 3. The Rehabilitation Issue before the United Nations, 1967

603. Before the United Nations and the Trusteeship Council the Nauruan position was the same as it had been in the talks leading to the 1967 Agreement. In his opening address to the 34th Session of the Trusteeship Council, Head Chief Hammer DeRoburt stated that, although the Nauruan Local Government Council worked in a climate of understanding at Canberra with the Respondent State, the only divergent views which appeared to be not reconcilable were those dealing with the question of the rehabilitation of the mined lands. The Council maintained that the Administering Authority should accept responsibility for the rehabilitation of lands already mined, while the Council would be responsible for the rehabilitation of lands mined from 1 July 1967: *Report of Trusteeship Council*

27 July 1966-30 June 1967, General Assembly Official Records, 22nd Session, Supp.No.4 (1967) pp.47-8.

604. There were strong observations in the Trusteeship Council on the eve of independence regarding the obligation to rehabilitate. For example, the representative of France regretted that no agreement had been reached on the question of rehabilitation:

> '412. The representative of France congratulated the representative of the Administering Authority, as well as the Nauruan people on the agreement reached on the question of phosphates. He was particularly glad that the full ownership of the phosphate deposits was granted to the Nauruan people.
>
> 413. The representative of France regretted that no agreement had been reached between the Administering Authority and the Nauruan people on the rehabilitation of the worked-out mining land despite the efforts undertaken for a long time. He hoped that an agreement could be reached on this question also, since many other thorny problems were settled between the Administering Authority and the Nauruan people.
>
> 414. The representative of France stated that although he was confident that the Nauruan people would administer with wisdom the assets accumulated from the sale of phosphate, which would enable them to live in relative affluence in Nauru itself (or elsewhere if they ever decided to settle down in another country), the future of the Nauruan people was darkened by the fact that in about twenty-six years the phosphate deposits would come to an end. He was therefore happy to note that the Nauruan leaders were thinking of setting up new activities which could one day at least, in part, substitute the wealth represented by the phosphate.'
>
> (*Report of the Trusteeship Council, 27 July 1966-30 June 1967, General Assembly Official Records* 22nd Session Supp. No. 4 (1966) p.50.)

605. The view that the question of rehabilitation was a separate and distinct issue had also been supported by the Liberian representative, who said that:

> 'The question of the restoration of the worked out phosphate land could not delay the granting of independence. Neither the question of ownership nor the question of restoration of the worked out phosphate lands were contingent one upon the other.'
>
> (*Report of the Trusteeship Council, 1 July 1965 - 26 June 1966, General Assembly Official Records* 21st Session Supp. No. 4 (1965) p.44.)

606. The representative of the Soviet Union urged the Respondent State to abandon any manoeuvres with regard to resettlement and to undertake, in accordance with General Assembly Resolution 2226 (XXI), the restoration of the mined out land at its own expense in order to create conditions permitting the people of Nauru to exist as a sovereign nation (*Report of the Trusteeship Council, 27 July 1966-30 June 1967, General Assembly Official Records* 22nd Session Supp. No. 4 (1966) p.50.)

607. It is true that the Trusteeship Council in 1967 rejected a Liberian draft resolution which provided in part as follows:

> "The Trusteeship Council,
>
> 4. *Recommends* that the Administering Authority take immediate steps towards restoring the Island of Nauru for habitation by the Nauruan people as a sovereign nation;
>
> 5. *Considers* that it is the responsibility of the Administering Authority to restore at its cost the worked-out land on the island until the time when the Nauruans receive the full economic benefit from the phosphates.

This draft resolution was rejected by a roll-call vote of five against (France, New Zealand, United Kingdom, United States, Australia) and two in favour (Liberia, Soviet Union) with one abstention (China) (*Trusteeship Council Official Records*, 34th session, 29 May - 30 June 1967, p.137. For the French and United States explanations of vote see ibid. For the text of the Liberian draft resolution (T/L.1132) see id, Annexes, p.2). But that rejection did not imply a rejection of the Nauruan claim: the matter was simply left to be resolved between the parties. This is made clear in the Report of the Trusteeship Council, which noted the difference of views between the two delegations and stated:

> "The Council, regretting that differences continue to exist on the question of rehabilitation, expresses earnest hope that it will be possible to find a solution to the satisfaction of both parties."
>
> (*Report of Trusteeship Council 27 July 1966-30 June 1967, General Assembly Official Records* 23rd Session Supp. No. 4 (1967) p.49.)

608. In addition the Committee of Twenty-Four in its resolution of 27 September 1967 requested the Administering Authority "to rehabilitate Nauru according to the express wish of the people so that they may continue

to live there": *General Assembly Official Records*, Twenty-Second Session, Annexes (XXII) 23/Add.1 (Part III) (Doc. A/6700/Rev.1, 1967), p.112.

609. At the 1323rd Meeting of the Trusteeship Council, Head Chief Hammer DeRoburt (who was present in his capacity as Special Adviser to the Australian delegation) spoke on the issue of Nauruan independence, and in particular referred to the still outstanding question of rehabilitation in these terms:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion -- responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims."
>
> (*Trusteeship Council Official Records*, 13th Special Session, 22 November 1967, p.3.)

610. This clear statement that the rehabilitation issue had not yet been the subject of agreement was not contradicted by any delegation. On the other hand, the Soviet delegate expressed his confidence that the legitimate demands of the Nauruan people for the rehabilitation of the land would be fully met: id., p.6.

611. When the matter came before the Fourth Committee of the General Assembly at its 1739th Meeting on 6 December 1967, the President of the Trusteeship Council (Ms Brooks, Liberia) welcomed the agreement reached with the partner governments. These views were echoed by Mr Rogers of Australia and Head Chief DeRoburt. In his speech on this formal occasion Head Chief DeRoburt did not mention the Nauruan claim to rehabilitation from the partner governments. He spoke of it in these terms:

> "That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been

> mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem: in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident they had the resources with which to sustain it.'
>
> (*General Assembly Official Records* 22nd Session, 1739th mtg, A/C.4/SR 173, p.395.)

612. Head Chief DeRoburt was speaking as a member of the Australian delegation. His speech must be read in the context of his earlier uncontradicted assertion of the Nauruan claim at the Trusteeship Council proceedings. The formal nature of the proceedings before the Fourth Committee and the spirit of the occasion made it an inappropriate forum before which to voice a note of discord. Thus there was no inconsistency between Head Chief DeRoburt's speeches on these two occasions. He had made his point with sufficient force and clarity before the Trusteeship Council. These two sessions leading to independence, held within a few days of each other, formed a connected set rather than a series of disparate and severable occasions.

613. It is clear that the General Assembly did not endorse the view that the rehabilitation claim was merged in or lapsed with the grant of independence. General Assembly Resolution 2347 (XXII) of 19 December 1967, adopted unanimously, recalled the earlier Resolutions 2111(XX) and 2221(XXI), both of which had contained strong recommendations with respect to rehabilitation, noted the agreement that Nauru should become independent on 31 January 1968 and resolved:

> 'In agreement with the Administering Authority, that the Trusteeship Agreement for the territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968...'

614. Having regard to the resolution of the Committee of Twenty Four, the views expressed in the Trusteeship Council, and the reference in General Assembly Resolution 2347 (XXII) to the earlier Resolutions 2111 (XX) and 2221 (XXI), it is impossible to construe Resolution 2347 (XXII) as an adverse determination upon Nauru's claim or as purporting to terminate any liability of the Respondent State to rehabilitate the worked-out lands -- even on the assumption that the General Assembly could validly have made such a determination.

Section 4. Affirmation of the Claim after Independence

615. The Nauruan claim was affirmed by the President of Nauru immediately upon Nauru's attaining independence. President DeRoburt's is reported as saying on 31 January 1968 that:

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one third of the island."
>
> ("*The Sun*" (Sydney), 2 February 1968. See also the extracts from other Australian newspapers set out in Annexes, vol.4, Annex 69.)

616. That view also found expression in the Nauruan Constitution. During the Proceedings of the Nauruan Constitutional Convention on 23 January 1968, a proposal was made to add a clause dealing with the Nauruan rehabilitation claim. That proposal was withdrawn, because, in the words of Professor Davidson, the Adviser to the Constitutional Convention, such a clause...

> "couldn't, in any way, improve the situation, because it is a matter that will have to be dealt with by negotiation at a governmental level, and this Constitution... can't impose an obligation on a foreign government..."
>
> (Territory of Nauru, *Record of Proceedings of the Constitutional Convention*, 23 January 1968, p.38; Annexes, vol.4, Annex 68.)

The clause under debate became Article 83 of the Constitution:

> "83. Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru."

617. Nonetheless concern continued to be felt on this issue, and four months after independence Article 83 of the Constitution was amended to provide:

> "(1) Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru.
>
> (2) Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the first day of July, One thousand nine hundred and sixty-seven."

618. The Nauruan claim was taken up, orally and in writing, in discussions with Australian leaders at intervals thereafter. For the diplomatic correspondence see Annexes, vol.4, Annexes 76ff.

Section 5. Conclusion

619. It is clear from the record that, despite the earlier acceptance by Australian representatives of an obligation to assist the Nauruans towards achieving a stable long-term future through such measures as resettlement, at the crucial time the Respondent State failed to satisfy what the Trusteeship Council had described in 1962 as "its obligation to provide such assistance": *Report of Trusteeship Council 20 July 1961-20 July 1962, General Assembly Official Records* 17th Session, Supp. No. 4 (A/5204) p.41. That obligation was one the Respondent State had consistently accepted in earlier discussions in United Nations forums, as has been demonstrated above. It is also clear from the record that the Nauruan claim for the rehabilitation of the mined-out lands was not withdrawn, was not traded away or denied by the Nauru Island Phosphate Industry Agreement 1967, and was not treated by the General Assembly or the Trusteeship Council as having been negated by the conferral of independence.

PART V

THE REMEDIAL POSITION

PART V THE REMEDIAL POSITION

Section 1. The Relief Requested

620. By its Application the Republic of Nauru requests the Court to adjudge and declare that Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered. Nauru further requests that the nature and amount of such restitution or reparation should, in the absence of agreement between the parties, be assessed and determined by the Court, if necessary, in a separate phase of the proceedings (Application, para 50). In respect of the quantification of damages, the Republic of Nauru also reserves the right to ask the Court, at the appropriate stage of the proceedings, to reflect the particular elements of excess and the lack of ordinary consideration in the conduct of the Respondent State by an award of aggravated or moral damages (in the compensatory mode) (Application, para 51).

621. At the present phase of the proceedings before the Court, the Applicant's primary request is for a declaration of the liability of the Respondent State with respect to the various breaches of obligation detailed in Part III of this Memorial. The substantive relief sought by the Applicant consists of restitution or other appropriate reparation to Nauru for the damage and prejudice suffered, and in particular for the cost of the rehabilitation of the phosphate lands worked out before 1 July 1967. Since the necessary reparation or restitution in respect of Nauru's loss could take a number of forms, including material assistance in an agreed programme to rehabilitate the lands in question, it is appropriate that the parties be given the opportunity to discuss the form and precise quantum of reparation in the light of the Judgment of the Court. If the parties fail to agree on these matters, the Republic of Nauru reserves the right, pursuant to paragraph 50 of its Application, to have the amount of damages or other reparation assessed and determined by the Court in a separate phase of the proceedings.

Section 2. Basis of Australian Responsibility

622. It is submitted that the responsibility of the Respondent State in respect of Nauru's claim is not qualified, limited or excluded in international law by reason of the involvement of the Governments of the United Kingdom and New Zealand in the arrangements for the administration of Nauru or the exploitation of its phosphate resources from 1919 onwards. This is so for the following reasons.

A. PRESUMPTION OF SEVERAL OR CONCURRENT RESPONSIBILITY

623. As a matter of international law, the presumption is that two or more States which are involved in some form of common enterprise are separately responsible for their own acts, notwithstanding the participation or support of other States. In other words the presumption is one of the several or concurrent responsibility of States.

624. The consistent jurisprudence of the Court in relation to decisions attributing responsibility to a particular State, as well as to applications to intervene under Article 62, bears out the essentially bilateral character both of international responsibility, and, correlatively, of contentious proceedings at the international level. Cases which illustrate this thesis include the *Corfu Channel Case* I.C.J. Rep. 1949 p.4 and the *Nicaragua Case (Jurisdiction and Admissibility)* I.C.J. Rep. 1982 p.392, which is analyzed in paragraph 647 below.

625. The point has also been underlined by the International Law Commission, for example, in its commentary to the Draft Articles on State Responsibility:

> "A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of Chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different

> from participation by one of those States in an internationally wrongful act committed by the other."
>
> (I.L.C. Ybk. 1978 vol. 2(2) p.99.)

626. A similar view has been taken in the decisions of various arbitral tribunals. For example In *Earnshaw v United States (The Zafiro)* ((1925) 6 R.I.A.A. 160) the Arbitral Tribunal held that the United States was wholly liable for damages substantially caused through the misbehaviour of its forces, because it could not show what proportion of the losses was caused at the time by Filipino insurgents (id., pp.164-5).

627. There is no support in the literature for a system of non-severable joint liability. For example Professor Brownlie, in one of the few textbook discussions of the subject, comments that "the practice of states is almost completely non-existent, or, seen differently, strongly suggests by its silence the absence of joint and several liability in delict in state relations": *State Responsibility Part I*, Oxford, Clarendon Press, 1983, p.189. See also J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility" (1986) 57 *British Yearbook of International Law* p.77 at pp.127-9.

628. As these authorities demonstrate, the principle of separate or solidary liability is a general rule of international law. No other rule could sensibly be applied to international disputes, given the basic principle that no State is subject to international adjudicative jurisdiction without its express conser In addition under its Statute the Court lacks any means by which it can require the participation in a proceeding of third States with an interest -- even an interest of a legal character -- in the proceeding. The only means by which interested third States can become parties to a proceeding is by an application to intervene under Article 62 of the Statute. As the use of the permissive "may" (in French "il peut") in Article 62 demonstrates, that machinery is not compulsory: it is entirely a matter for a State which (in the words of Article 82 of the Rules) "desires to avail itself of the right of intervention" to apply to do so. The Court thus lacks entirely the power, which in municipal law is the necessary correlative of a rule that all necessary parties must be joined in particular proceedings, to require that interested third States be mad parties to proceedings before it.

629. The strong international policy favouring peaceful settlement of disputes by adjudication or other forms of third party settlement would be frustrated if any other rule were to be applied. Shared or co-operative activities by several States are increasingly common. But if the international law rule in relation to the shared activities of States involved a form of joint responsibility, such that no individual State -- including the State with the primary or even sole operational responsibility for the conduct in question -- could be made liable unless in proceedings to which all the States concerned in the activity were parties, a State would only have to co-opt another appropriate State, or obtain its consent or use its territory or facilities, in the course of committing some international wrong, to obtain immunity from the possibility of international adjudication or some other form of agreed third party dispute settlement. It is submitted that this is not the present state of international law.

630. The corollary of the concurrent or several responsibility of States for their acts at the international level -- and the protection extended by international law to third States who have participated in some common activity but who do not elect to intervene in proceedings against some other State which instigated or was equally involved in the activity -- is that the decisions of the Court as between the parties in no way bind third parties, even indirectly. The rule is expressly and emphatically affirmed in Article 94(1) of the Charter and in Article 59 of the Statute of the Court. Under Article 94(1) of the Charter, the obligation to comply with judgments of the Court is limited to those States which are parties to the case in question. Article 59 of the Statute of the Court provides:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

No other legal protection for third parties in respect of international responsibility is necessary or desirable.

B. Application of the Presumption in the Present Case

631. Australia was a party to the various legal instruments concerning the administration of Nauru from 1919 onwards. The terms of these instruments

have been examined in Parts III and IV of this Memorial. The following observations are applicable to those instruments.

632. So far as the Mandate was concerned, the preamble to the Trusteeship Agreement recognized that Nauru "has been administered... by the Government of Australia on the joint behalf of" the three Governments.

633. Article 2 of the Trusteeship Agreement designated the three governments as "the Administering Authority". But Article 4 of the Trusteeship Agreement stated that "Australia, on behalf of the Administering Authority... will continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory" until otherwise agreed between the three governments. It was never "otherwise agreed".

634. The 1965 Agreement between the three partner Governments went even further in recognizing, "conformably with the Trusteeship Agreement", Australia's unique and directive role in the administration of the Trust Territory: see paragraphs 517-518 above for an analysis of the 1965 Agreement, and see further paras. 150-151.

635. Nothing in any of these instruments expressly or by implication created a system of non-severable joint liability, preventing or precluding the individual States from being called to account with respect to their acts in the administration of the trusteeship. In other words, the normal presumption of solidary or separate liability in international law was not displaced by the relevant legal provisions, so far as Australia is concerned.

636.If the joint administration of Nauru under the Mandate and Trusteeship instruments had entailed a form of joint responsibility of a non-severable character, the result would have been, in practice, that the degree of actual responsibility of any of the governments, including responsibility for decisions taken and implemented by a Government on its own account, would have been attenuated, if not avoided entirely. Each government could deny its own responsibility for acts done or decisions taken by claiming that the other parties were not, and could not be made parties to the claim without their consent. The result of this view would have been that the involvement of more than one State in the Trusteeship Agreement would have substantially reduced the level of international accountability for the administration of the Territory, rendering the "securities for the performance of the trust" that much less secure.

637 As the historical record (analyzed in paragraphs 29-35, 109-116 above) shows, the addition, and retention, of the United Kingdom and New Zealand as parties to the Mandate and Trusteeship instruments was done not with a view to reducing the level of Australia's international accountability for the administration of the Territory -- if anything, the situation was entirely the reverse.

638. It is also significant, in this context, that the Respondent State has never denied its responsibility for the rehabilitation of the phosphate lands on Nauru by relying on the non-involvement of the other two Governments in the claim. That position was never taken in the proceedings relating to Nauru before the League of Nations and the United Nations, and it has never been taken in the diplomatic correspondence between the parties relating to the claim: see Annexes, vol.4, Annex 76ff.

639. It may be noted, in passing, that the possibility of claims being successfully brought against a single State in respect of the administration of Nauru is expressly contemplated in the Agreement between the Governments of Australia, New Zealand and the United Kingdom of 9 February 1987, terminating the Nauru Island Agreement Act 1919 (*Australian Treaty Series* 1987 No. 8; Annexes, vol.4, Annex 31). Under Article 2 of that Agreement...

> "Each of the Partner Governments shall indemnify the Commissioner appointed by that Government who holds office immediately before the entry into force of this Agreement in respect of liabilities incurred in the course of his duties as a Commissioner."

The Agreement goes on to provide in Article 3(3)(b) for consultation between the parties in respect of legal claims brought against any of them, and for contribution to be made as between them to meet any claims, *inter alia*, where...

> "a Partner Government is obliged to make a payment following an order of a Court of competent jurisdiction adjudicating upon a claim..."

This clearly envisages the possibility of successful claims against one of the parties only, while making provision for contribution as between the parties, in unequal shares (viz. Australia, 47.5%; United Kingdom, 31.5%; New Zealand, 21.0%, corresponding to the proportions in which the property of the British Phosphate Commissioners was divided up between them). Any claimant would necessarily be a third party both to the 1987 Agreement and to the earlier arrangements between the three Governments. Such a claimant could not be expected to make claims against each of them in these -- or indeed in any -- fractions.

640. It should also be noted that throughout the period of the administration of Nauru, a claim brought in the courts of any of the three Governments against any party other than that Government would have been liable to a successful plea of state immunity. At all relevant times the common law rule applied by the courts of the three States was that a foreign State and its agents or functionaries was absolutely immune from local jurisdiction. Unless the claim had been brought against the forum government alone, there was accordingly no means of securing jurisdiction over such claims.

C. THE SPECIFIC ROLE OF AUSTRALIA IN THE ADMINISTRATION OF NAURU AND IN NEGOTIATING THE TERMS OF NAURUAN INDEPENDENCE

641. Even if the international law rule were simply one of several or solidary liability, it must be the case that a State remains separately responsible for its own actions and decisions, even if those are taken with the agreement of or in the interests of other States or on their behalf as well. Whatever the position with respect to a State whose participation in an activity was secondary or limited, a State which was the effective agent in carrying out an activity must be responsible for its consequences, notwithstanding the additional involvement of some other States.

642. Australia's role in the administration of Nauru, and in negotiating with Nauruan representatives with respect to phosphate royalties, control over mining, possible resettlement or rehabilitation, and ultimately independence, was not secondary or peripheral but primary. See paragraphs 50-52, 57, 64, 101, 130, 134, 151, 156, 166, 177, 516-540.

643. This primary responsibility, reflected in the various international arrangements and agreements for the administration of Nauru, was voluntarily assumed by Australia. It was so pronounced that some writers go so far as to treat Australia as the real administering authority over Nauru, on

the basis that the reference in the Trusteeship Agreement to the three governments as "the Administering Authority" was a kind of "legal fiction".[3] It is not necessary to go as far as this to establish the propriety of proceeding against Australia alone in respect of the Trusteeship Agreement. Even if the Court were to adopt a different view of the international law rule of state responsibility than that contended for in paragraphs 5-13 above, this would not absolve Australia as the principal actor, the "directing mind and will", in the administration of Nauru. In determining responsibility for the outcome of that administration, the substance of the situation, recognized in Article 4 of the Trusteeship Agreement, cannot be ignored.

D. NON-EXISTENCE OF PROCEDURAL OBSTACLES IN THE PRESENT CASE

644. For these reasons, Australia is itself liable for any breaches of the Trusteeship Agreement and of any associated rules of general international law. It must follow, it is submitted, that there is no difficulty in the Republic of Nauru proceeding against Australia alone in respect of its claim.

645. In only one case has the Court refused to decide a contentious case on the ground that a "necessary party" was not a party to the proceeding. That was the *Monetary Gold Case* (I.C.J. Rep. 1954 p.32), where -- at the instance of the Applicant State itself -- the Court declined to hear a case which involved property acknowledged by the parties to belong to another State not a party to the proceedings (Albania).

646. In later cases, the Court has been careful not to extend the *Monetary Gold* principle beyond the specific circumstances of that case, where the rights of a third State were the very subject matter of the claim. In the *Libya/Malta Case (Italian Application to Intervene)* the Court stated that:

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[3] For example, A.H. McDonald (ed.) *Trusteeship in the Pacific*, Angus & Robertson, Sydney, 1949, p.43 ("for practical purposes Nauru was an Australian mandate"); R.N. Chowdhuri, *International Mandates and Trusteeship Systems*, The Hague, Nijhoff, 1955, p.96 (in reality a single State acted as administering authority); H. Duncan Hall, *Mandates, Dependencies and Trusteeship*, London, Stevens, 1948, p.147 (no intention to establish a condominium on Nauru; Australia acted as "agent"); W.J. Hudson, *Australia and the Colonial Question at the United Nations*, Sydney, Sydney UP, 1970, p.4. One writer goes so far as to argue that "by the time the Mandate for Nauru entered into force, Australia had become the administering authority and was thus the actual mandatory", citing Art. 81 of the Charter: C.E. Toussaint, *The Trusteeship System of the United Nations* (London, Stevens, 1956) pp.80, 97, 169, 205.

> "In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as party, it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the Monetary Gold Removed from Rome in 1943, the legal interests of the third State 'would not only be affected by a decision, but would form the very subject-matter of a decision', which is not the case here."
>
> (I.C.J. Rep. 1984 p.3 at p.25.)

This was despite the fact that Italy was potentially affected by aspects of the Libya/Malta continental shelf delimitation in a relatively direct way.

647.Similarly, in the *Nicaragua Case (Jurisdiction and Admissibility)* the Court flatly rejected the argument that the Central American States on whose behalf the United States claimed to be acting in self-defence were indispensable parties in whose absence the case could not proceed. The Court stated:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the *Case concerning Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision'. Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated, other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings."
>
> (I.C.J. Rep. 1984 p.392 at p.431.)

On this point the Court was unanimous.

648. This emphasis on jurisdiction over individual States, irrespective of the involvement or participation of other States, is consistent with the modern law on State responsibility (see paras. 623-630 above).

649. It is submitted that the Court should not decline to exercise jurisdiction over a State in respect of an alleged wrong committed by State officials under the direct authority and control of the State, on the ground that another State is equally responsible for the wrong-doing, or that the official was also authorized to act as agent on behalf of some other State involved. Against the background of the circumstances of the administration of Nauru, the negotiations relating to its independence, and the subsequent relations between the various parties, it was open to Nauru to commence proceedings claiming appropriate relief against the Commonwealth of Australia alone. The possible liability of the other partner Governments would not "form the very subject-matter of" any decision by the Court in this case (cf. I.C.J. Rep. 1984 p.3 at p.25), nor is the participation of any other State "truly indispensable to the pursuance of the proceedings" (cf. I.C.J. Rep. 1984 p.392 at p.431).

Section 3. Liberty of Nauru as to Choice of Remedies

650. In the same context, it is submitted that Nauru is acting within its rights in electing to pursue one remedy, or one form of relief, and not others that might be available to it, and in seeking its primary relief in respect of one description or category of damage suffered, rather than another.

651. The *ne ultra petita* rule, universally applied by international courts and tribunals, recognizes that a State may claim less than its entitlement, and may elect as between the remedies available to it which to pursue in particular proceedings, while reserving its rights in respect of other remedies.

CONCLUSION

Affirmation

652. The system of government established in Nauru as a consequence of the 1919 Agreement, maintained in all its essentials until the independence of Nauru, involved an entire structure of inequitable practices. Despite the obligations of the Mandate and subsequently of the regime of trusteeship, the system of removing the phosphate at cost consisted of a set of entrenched and extensive economic prerogatives. This system of economic autocracy was combined with a failure to report fully and fairly to the Trusteeship Council.

653. The consequences of this situation for the Nauruan people included the physical destruction of much of their homeland without adequate arrangements to provide for the costs of rehabilitation, the build up of a serious loss of earnings (and thus of loss of capital for development), loss of land use, and the denial of the legal interest of Nauru in the overseas assets of the British Phosphate Commissioners.

654. In contrast Australia did not have to pay any administration costs in respect of Nauru, received high quality phosphate on what was in reality a basis of subsidy, paid no resettlement costs, and at independence required Nauru to pay for the assets on the island which should have passed to the successor State as public property. Moreover, long after independence Australia obtained a major allocation of the overseas assets of the British Phosphate Commissioners as a consequence of the trilateral Agreement of 1987.

655. It would be paradoxical if a people who had been the subject of a regime of trusteeship should be much worse off than a community which, as a state, had been subject to the procedures of state succession.

Confirmation

656. A great deal of evidence has been presented in the body of the Memorial and here it is necessary simply to highlight two important sources of confirmation.

657. The first source consists of the statement by Mr. Hammer DeRoburt, Head Chief, Nauru Local Government Council (Appendix 1). This statement provides a first hand account of the key episodes from one who had a leading role in the attainment of independence by the Nauruan people. The statesmanship and moderation which characterised Mr. Hammer DeRoburt are acknowledged by contemporary observers.

658. The second source of confirmation takes the form of the three leading historical accounts of the relevant period:

(a) Nancy Viviani, *Nauru: Phosphate and Political Progress*, Australian National University Press, Canberra, 1970, chapters 3 to 9.

(b) Maslyn Williams and Barrie Macdonald, *The Phosphateers*, Melbourne University Press, Melbourne, 1985 (passim).

(c) Barrie Macdonald, *In Pursuit of the Sacred Trust: Trusteeship and Independence in Nauru*, New Zealand Institute of International Affairs, Occasional Paper No. 3, Wellington, 1988 (passim).

659. The essential elements in the case are confirmed by these three works and this congruence of judgment cannot readily be ignored. The work of Williams and Macdonald is of particular interest, partly because of its detail and partly because its authors show no disposition to be unduly critical of the operational style of the British Phosphate Commissioners.

660. The work of Williams and Macdonald, *The Phosphateers*, includes a striking passage which involves the reporting of the following series of admissions:

(a) A statement by the Australian Secretary of the Department of Territories, Mr Lambert, to Mr Bissett, General Manager of the British Phosphate Commissioners (1954-66).

(b) A statement of a senior official of the Commonwealth Relations Office to the British member of the Commissioners, Mr Calder.

(c) A statement by Mr Bissett to the New Zealand Commissioner, Mr Tennent.

661. The relevant passage (at page 472) is as follows:

> "Having bought a respite in the Trusteeship Council with its resettlement plans in 1961, the Department of Territories had made little progress with the Nauruans since. With a Visiting Mission due in Nauru in May 1962, and a further round of Trusteeship Council hearings in June, the Department was left in a vulnerable position. It was in this context that Lambert informed Bissett that 'It is felt that the Government can no longer sustain its objections that there are no separate figures available for Nauru', and the Commissioners were asked to release f.o.b. costs for Nauru with the implication that members of the Trusteeship Council could then compare these costs with the price of phosphate sold on the open market.
>
> Neither the United Kingdom nor New Zealand was prepared to accept the necessity for such a drastic step at this stage. A senior official of the Commonwealth Relations Office told Calder that:
>
> > 'If we can improve the kind of case we presented to the Trusteeship Council in the past I should be in favour of doing this but I suspect that we may be in danger of giving information which would only be used to make life more difficult for us.'
>
> Bissett acknowledged that 'we would be regarded as a poor outfit if we could not determine Nauru costs separately' and admitted to Tennent that the Commissioners 'had been lucky to get away with this attitude for so long', but even he was surprised to find the extent to which economies of scale and the relatively low royalties and government levies payable resulted in an f.o.b. cost significantly below the cost of phosphate from other sources."

Documents

662. The parties to the present proceedings have exchanged correspondence on the subject of the production of documents and the relevant items are to be found in the annexes (Annexes, vol. 4, Annex 80). On the general question of the production of documents, the Government of Nauru acknowledges that the Australian Government has extended a degree of co-operation. But the fact remains that the process has been slow, reluctant and incomplete.

663. In the circumstances the Government of Nauru finds it necessary to reserve its position on the production of documents. This reservation also extends to the related question of *access* to Australian archive material.

664. The Government of Nauru has a specific interest in the material in the Australian archives which relates to the administration of Nauru under the Mandate and the United Nations trusteeship. Such material in fact forms a part of the national patrimony of the Republic of Nauru.

665. The legal interest of a State in the position of Nauru in its pre-independence archives was given clear recognition by the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts in its Resolution Concerning Namibia (Annexes, vol. 4, Annex 23).

666. This legal interest should be recognised by allowing access on reasonable terms. The issue has already been raised by the Government of Nauru in a Note (No. 252) dated 22 November 1989 (Annexes, vol. 4, Annex 80), which reads (in material part):

> 'On the wider point of access to archives documents, the Department has the further honour to point out that the Department's request is simply for access. The documents relating to the Mandate and Trusteeship over the Territory of Nauru are custodially with the Australian Government, and have never since independence been placed with or generally been accessible to the Government of the Republic of Nauru. Such documentation relating to the former Trust Territory of Nauru is not the documentation in which the Australian Government has an exclusive interest. The Department has the honour to point out further that it is not therefore always possible in advance to identify particular documents and hence the request for access.'

667. In this same connection the Government of Nauru would recall its statement (in the same Note) "that in legal proceedings between Nauru and Australia the municipal archives rule should have no operation".

668. The Government of Nauru considers it necessary to focus on the question of access to archives in view of the continuing insensitivity of the Australian Government to the question of principle involved. Thus in a Note dated 30 January 1990 (Annexes, vol. 4, Annex 80) (in response to the Nauruan Note (No. 252) of 22 November 1989) the Australian Government stated the following opinion:

> "The High Commission wishes to explain and confirm the views of the Australian Government on these matters. The Australian Government cannot accept that there is any special or general right of access on the part of Nauru to Australian archival material during the period of the mandate or the trusteeship. Such a right would be inconsistent with the sovereignty of states. The only possible exception in the present case would appear to be those documents relating to the local Administration of Nauru, which were in fact made available to Nauru on independence."

669. It is evident that Australia cannot have an exclusive interest in archival material relating to the trusteeship administration.

Reservation

670. Prior to presenting its Submissions the Republic of Nauru respectfully reserves the right to supplement or amend its claims.

SUBMISSIONS

On the basis of the evidence and legal argument presented in this Memorial, the Republic of Nauru

Requests the Court to adjudge and declare

> that the Respondent State bears responsibility for breaches of the following legal obligations:
>
> First: the obligations set forth in Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.
>
> Second: the international standards generally recognised as applicable in the implementation of the principle of self-determination.
>
> Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources.
>
> Fourth: the obligation of general international law not to exercise powers of administration in such a way as to produce a denial of justice *lato sensu*.
>
> Fifth: the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights.
>
> Sixth: the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.

Requests the Court to adjudge and declare further

> that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were martialled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987.

Requests the Court to adjudge and declare

> that the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of the breaches of its legal obligations detailed above and its failure to recognise the interest of Nauru in the overseas assets of the British Phosphate Commissioners.

(*Signed*) V.S. MANI

Agent for the Government of
the Republic of Nauru

20 March 1990

APPENDICES [1]

1. "Statement by Hammer DeRoburt, O.B.E., G.C.M.G., M.P., Head Chief, Nauru Local Government Council"

2. "Estimates of the F.O.B. Cost of Nauru Phosphate, the Commercial Price for Nauru Phosphate and the Loss of Earnings from the Underpricing of Nauru Phosphate" by Mr. K.E. Walker

3. "A Comparative Survey of the Law of Trust and Trust-like Institutions" by Professor A.M. Honore, Q.C., F.B.A.

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[1] Not reproduced. *[Note by the Registry.]*

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Maps

1. Location. [*Source:* Prepared and supplied by Directorate of Lands and Survey, Republic of Nauru.]
2. Nauru, mining up to July 1967. [*Source:* As above.]
3. Nauru — location and direction of photographs. [*Source:* As above.]
4. Location and scope of mining — German period 1906-1913. [*Source:* Tafel IVa, Corallogene Phosphat-Inseln Austral-Oceaniens und ihre Produkte, Carl Elschner, Lübeck, 1913.]

Photographs [Taken on Nauru between 17 and 25 October 1989 by J. Gollings acting through Helen Bogdan & Associates, Melbourne, on instructions and advice of Chief Secretary and the Directorate of Lands and Survey, Republic of Nauru.]

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[1] Not reproduced. [*Note by the Registry.*]

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* *Annex 3.* Report by Committee appointed to investigate the Possibilities of Rehabilitation of Mined Phosphate Lands, 1966 ("The Davey Report").

Annex 4. Nauru Phosphate Industry Record of Discussions held in Canberra, 14 June-1 July 1966.

Annex 5. Nauru Talks 1967 — Summary Records of Discussions and Related Papers from beginning of Talks (12 April) to Heads of Phosphate Agreement (16 June).

Annex 6. Agreement relating to the Nauru Island Phosphate Industry, 1967[2].

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B. United Nations Visiting Mission Reports

Annex 7. United Nations Visiting Mission to Trust Territories in the Pacific, 1951, Report on Nauru (Trusteeship Council Official Records, Eighth Session, Supplement No. 3).

Annex 8. United Nations Visiting Mission to Trust Territories in the Pacific, 1953, Report on Nauru (Trusteeship Council Official Records, Twelfth Session, Supplement No. 2).

Annex 9. United Nations Visiting Mission to Trust Territories in the Pacific, 1956, Report on Nauru (Trusteeship Council Official Records, Eighteenth Session, Supplement No. 4).

Annex 10. United Nations Visiting Mission to Trust Territories of Nauru, New Guinea and the Pacific Islands, 1959, Report on Nauru (Trusteeship Council Official Records, Twenty-Fourth Session, Supplement No. 4).

Annex 11. United Nations Visiting Mission to Trust Territories of Nauru and New Guinea, 1962, Report on Nauru (Trusteeship Council Official Records, Twenty-Ninth Session, Supplement No. 2).

Annex 12. United Nations Visiting Mission to Trust Territories of Nauru and New Guinea, 1965, Report on Nauru (Trusteeship Council Official Records, Thirty-Second Session, Supplement No. 2).

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[1] Only those annexes preceded by an asterisk have been reproduced. [*Note by the Registry.*]

[2] The text of this Agreement is reproduced in Annex 9 to the Preliminary Objections of Australia (see **II**, p. 174).

C. United Nations resolutions, etc.

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Annex 14. General Assembly resolution 322 (IV), Economic Advancement in Trust Territories, 15 November 1949.

Annex 15. General Assembly resolution 2111 (XX), Question of the Trust Territory of Nauru, 21 December 1965.

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Annex 17. General Assembly resolution 2347 (XXII), Question of the Trust Territory of Nauru, 19 December 1967.

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Annex 18. Resolution 11 (II), Transmission of the Provisional Questionnaire to the Government of Australia with Regard to the Trust Territory of Nauru, 2 December 1947.

Annex 19. Trusteeship Council resolution 2149 (S-XIII), The Future of Nauru, 22 November 1967.

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* *Annex 26.* Nauru Island Agreement, 2 July 1919.

Annex 27. Mandate for Nauru, 17 December 1920.

* *Annex 28.* Supplementary Agreement concerning Nauru, 30 May 1923.

Annex 29. Trusteeship Agreement for the Territory of Nauru, 1 November 1947.

* *Annex 30.* Agreement between the Three Partner Governments relating to Nauru, Canberra, 26 November 1965.

* *Annex 31.* Agreement between the Government of Australia, the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland to Terminate the Nauru Island Agreement 1919, 9 February 1987.

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* *Annex 34.* Lands Ordinance 1921 (Nau).
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Annex 45. Agreement between King George V & Others and Pacific Phosphate Company Ltd, 25 June 1920, First Schedule.
Annex 46. Indenture, dated 31 December 1920, between the Pacific Phosphate Company, King George V & Others.

G. Internal memoranda, etc.

Annex 47. Memorandum from Griffiths to the Secretary, Prime Minister's Department, 14 September 1925; Australian Archives, ACT, CRS A518, D 112/6/1.
Annex 48. Dickinson, Letter to Under-Secretary of State, Dominion Office, 31 December 1925.
Annex 49. Dominions Office, Letter to A. R. Dickinson, 27 January 1926, D 794/26.
Annex 50. Memorandum to Prime Minister, 25 March 1926, Australian Archives, ACT, CRS A518, D 112/6/1.
Annex 51. Letter, Griffiths to Secretary, Prime Minister's Department, 28 October 1926; Australian Archives, ACT, CRS A518 D 112/6/1.
Annex 52. Letter, Griffiths to Secretary, Prime Minister's Department, 9 November 1926; Australian Archives, ACT, CRS A518 D 112/6/1.
Annex 53. Memorandum, Secretary of State for the Dominions to the Governor-General of Australia, 29 March 1927, pp. 1-2.
Annex 54. Board of Commissioners, Memorandum No. 96, 12 September 1927, Item 25 "Land Question", pp. 16-18.
Annex 55. Australian Solicitor General, Opinion No. 111, 22 October 1936 (file 36/438).
Annex 56. Australian Prime Minister to British Secretary of State for Dominion Affairs, 10 May 1939, British Public Records Office No. 140/259.
Annex 57. Pacific Conference Papers. Notes for Minister No. 5, "D. United States Interest in the 'C' Mandates" (Advice by Sir Kenneth Bailey), January 1944, Australian Archives, ACT, CRS A989, Item 44/735/321/4.
Annex 58. British Phosphate Commissioners, Selected Minutes (1946-1956).

Annex 59. Documents relating to the Exclusion of the Inhabitants of the Aiwo District, 1945-1946.

Annex 60. Secretary, Australian Department of Territories (Lambert), Memorandum, "The Future of Nauruans", 4 June 1953, views of Minister (Hasluck) attached, Australian Archives ACT CRS A518, Item DR 118/6.

Annex 61. Notes of Meeting of Board of Commissioners with Representatives of Commonwealth Bank, 21 August 1953.

Annex 62. Secretary, Australian Department of Territories (Lambert), Memorandum, "Resettlement of Nauruans", 5 November 1953, views of Minister (Hasluck) attached, Australian Archives, ACT, CRS A518, Item DR 118/6 Pt. 1.

Annex 63. P. Hasluck, Minister for Territories, "Cabinet Submission No. 588: Australian Phosphate Supplies", 12 October 1955, and attached "Notes on Cabinet Submission No. 588, Australian Phosphate Supplies", Australian Archives, A4906/XM, Item Vol. 22.

Annex 64. Advice of the Crown Solicitor, 23 April 1956, in response to a request from the Department of Territories, and attached documents, Australian Archives, ACT, CRS A432, Item 52/237.

Annex 65. Australian internal memorandum, undated (?1950s).

Annex 66. British Phosphate Commissioners, "Confidential Report and Accounts for 45th Year ended 30th June, 1965", Melbourne, 19 November 1965.

H. Miscellaneous

Annex 67. United States, Draft Convention concerning the Territory formerly the German Protectorate of South West Africa, the Island of Nauru and the former German Island Possessions in the Pacific Ocean South of the Equator other than the Island of Nauru and former German Island of Samoa, London, October 1923, Australian Archives ACT, CRS A989, Item 44/735/321/4.

Annex 68. Extract from: Territory of Nauru, Record of Proceedings of the Constitutional Convention, 23 January 1968, p. 38.

Annex 69. Extracts from Australian Newspapers reporting Nauruan independence: *The Sun* (Sydney), 2 February 1968, and others.

Annex 70. Report on Exchange of Views between President of Nauru and Minister of Foreign Affairs Australian, Nauru Government "Bulletin" No. 21/86, 28 May 1986.

Annex 71. Commission of Inquiry into the Rehabilitation of Worked-out Phosphate Lands of Nauru, Report, Vol. 5, 1988, pp. 1019-1027 (vegetation of Nauru).

Annex 72. Commission of Inquiry into the Rehabilitation of Worked-out Phosphate Lands of Nauru, Report, Vol. 5, 1988, pp. 1028-1031 (history of mining on Nauru).

Annex 73. Evidence of Mr. R. Marsh, Commission of Inquiry into the Rehabilitation of Worked-out Phosphate Lands of Nauru, Transcript of Proceedings, 8 July 1987, pp. 851-865.

Annex 74. Dowiyogo, "The Law of Land Holding in Nauru" (unpublished paper prepared for the Nauru Commission of Inquiry, 1989).

I. Diplomatic correspondence

Annex 75. French Ambassador, London, to British Foreign Office, 1934: Public Records Office, London: Dominions Office 140/258.

Annex 76. Letter, President of Nauru to Australian Minister for External Affairs, 5 December 1968.

* *Annex 77.* Letter, Australian Minister for External Affairs to President of Nauru, 4 February 1969.

* *Annex 78.* Letter, President of Nauru to Australian Prime Minister, 6 October 1983.

Annex 79. Note No. 14/84, Australian High Commission relaying response of Prime Minister of Australia to President's letter of 6 October 1983, 19 March 1984.

Annex 80. Correspondence (1986-1990) relating to the Nauruan Claim.

Annex 3

REPORT BY COMMITTEE APPOINTED TO INVESTIGATE THE POSSIBILITIES OF REHABILITATION OF MINED PHOSPHATE LANDS, 1966 ("THE DAVEY REPORT")

TERRITORY OF

NAURU

REPORT BY COMMITTEE APPOINTED

TO

INVESTIGATE THE POSSIBILITIES

OF

REHABILITATION OF
MINED PHOSPHATE LANDS

1966

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Sydney
1966

Sir,

I have the honour to submit to you, in accordance with the terms of reference agreed upon between the Australian delegation on behalf of the Administering Authority and a delegation from the Nauru Local Government Council at discussions held in Canberra in May/June 1965, the report of the Nauru Lands Rehabilitation Committee concerning the question of restoring the mined out phosphate lands of the Island of Nauru.

(Signed) G.I. Davey,
Chairman, Nauru Lands
Rehabilitation Committee.

The Hon. C.E. Barnes, M.P.,
Minister for Territories,
Parliament House,
CANBERRA.

Sydney
1966

Sir,

In accordance with the terms of reference agreed upon between the Australian delegation on behalf of the Administering Authority and a delegation from the Nauru Local Government Council at discussions held in Canberra in May/June 1965, I have the honour to transmit through you to the Nauru Legislative Council the report of the Nauru Lands Rehabilitation Committee concerning the question of restoring the mined out phosphate lands of the Island of Nauru.

(Signed) G.I. Davey
Chairman, Nauru Lands
Rehabilitation Committee

President,
Nauru Legislative Council,
NAURU, Central Pacific

ACKNOWLEDGMENTS

The Committee takes this opportunity to express its gratitude to those governmental officers who provided much useful information in the course of the Committee's investigations. In particular the Committee would like to thank the Secretary of the Commonwealth Department of Territories, Mr. G. Warwick Smith, O.B.E. and senior officers of the department in Canberra and Sydney, who provided valuable assistance and facilities for the meetings of the Committee.

The Committee wishes to acknowledge the most efficient and competent work done by Mr. Maurice Culnane as Secretary and Executive Officer of this Committee, and his invaluable aid based on his detailed knowledge of Nauruan affairs.

Thanks are also due to the then Administrator at Nauru, Mr. R.S. Leydin, O.B.E. and senior Administration officials who supplied the Committee with much historical and other advice essential for the Committee's purposes.

Finally, the Committee is appreciative of the courtesy shown and the hospitality extended to the Committee during its stay at Nauru by the Island Manager of the British Phosphate Commissioners and his officers, and of the valuable time and assistance given by senior technical officers of the Commissioners both at Nauru and at the Commissioners' head office in Melbourne.

SECTION ONE.

(a) INTRODUCTION

(i) The question of rehabilitating the mined phosphate areas of Nauru has been raised from time to time over a period of many years. Referred to in the past variously as "restoring", "resoiling", "regenerating", "rehabilitating", etc., the question apparently had as its objective some programme of orderly treatment of those parts of the island denuded of their topsoil and phosphate. This would provide fertile areas of land suitable for the growing of coconuts, pandanus, tomano and other trees, and, in general, make for a more congenial environment for the Nauruans when the phosphate deposits were exhausted.

(ii) In 1954 the Commonwealth Scientific and Industrial Research Organization, at the request of the Commonwealth Government, carried out a survey of the possibility of restoring the worked-out lands at Nauru. Its conclusions were that while it would be possible to level out the worked areas and cover them with imported soil, there was no certainty that the soil would remain on the surface and not be washed away. This doubt, together with the uncertainty of adequate water resources to supplement rainfall, led the investigators to rule out the ultimate success of such a project.

(iii) Subsequently it was proposed to resettle the Nauruans in a new home and the matter of rehabilitating the island was allowed to lapse. However, when in August 1964 negotiations between the Commonwealth Government and the Nauruans failed to reach a satisfactory conclusion for resettling the Nauruans on Curtis Island, near the Queensland coast, the Nauruans expressed the wish that they remain on Nauru and not seek another home. This view was reaffirmed at discussions which the Nauru Local Government Council had with the Commonwealth Government in June 1965, when the Nauruan delegation requested that following their decision to stay on Nauru, the Administering Authority should assume responsibility for the restoration of the mined areas, at no cost to the Nauruans.

(iv) The Australian Government was not able to commit the other partner Governments to any such rehabilitation proposals "the objectives and costs of which were unknown and the effectiveness of which was uncertain". It was agreed, however, to establish an independent technical committee of experts to examine the question. Hence, late in 1965, the Minister for Territories appointed the Committee, the individual members of which were mutually acceptable to the Nauru Local Government Council and the Administering Authority.

(v) The members of the Committee so appointed were :-

Mr. G.I. Davey (Chairman)	Consulting Engineer, Sydney, N.S.W.
Professor J.N. Lewis	Professor of Agricultural Economics, University of New England, Armidale, N.S.W.
Mr. W.F. Van Beers	Soils and Land Classification Officer of the F.A.O., Rome, Italy.

(vi) The Committee held its first meeting in Sydney on 26th January, 1966. It then conferred with officers of the Department of Territories in Canberra on 3rd February and with senior officials of the British Phosphate Commissioners in Melbourne on 4th February, leaving for Nauru by air on the same day. During the ten-day visit to Nauru the Committee had detailed discussions with all the Nauruan members of the newly-formed Legislative Council, with the Administrator and his senior officers and with the Island Manager of the British Phosphate Commissioners and his technical officers. The Committee also carried out several extensive inspections of the worked-out and other areas of the Island. A summary listing the various officials and other persons interviewed by the Committee in Australia and at Nauru is shown in Appendix I.

(b) ITINERARY OF COMMITTEE

Jan. 26th	Sydney	First Meeting of the Committee.
Feb. 3rd	Canberra	The Committee had discussions with the Secretary (Mr. G. Warwick Smith); the Assistant Secretary - S. & G.S. - (Mr. C.E. Reseigh); and the Director - I.R. & I. - (Mr. R. Marsh), of the Department of Territories.
Feb. 4th	Melbourne	Discussions with the Assistant General Manager - Production - (Mr. T.A. Adams); informal talks with the Australian Commissioner (Sir William Dunk), the General Manager (Mr. J.A. Bissett), and the Deputy General Manager (Mr. L.E. Ravenscroft), of the British Phosphate Commissioners.
" "	"	p.m. Departed by air for Nauru.
Feb. 5th	Nauru	p.m. Arrived at Nauru. Met by the Administrator, the Official Secretary, the Head Chief and Councillors, the Island Manager of B.P.C. and Mr. R. Nevile of B.P.C. Melbourne.
Feb. 6th	"	General inspection of plateau areas and tour of the island perimeter with the Assistant Manager - Engineering - (Mr. L. Withers).
Feb. 7th	"	p.m. A meeting took place at Domaneab with all Nauruan members of the Legislative Council.
Feb. 8th	"	a.m. Meeting with the Island Manager (Mr. W. Marston); the Assistant Manager - Engineering - (Mr. L. Withers) and the Resident Civil Engineer (Mr. B.J. Webb).
		p.m. Inspection of the plateau area.
Feb. 9th	"	p.m. General inspection of old areas and plateau with Councillors Bernicke, Doguape and Eoaea.
Feb. 10th	"	Visit to the Administration Library; discussion with Director of Education (Mr. Allison) and visit to Legislative Council in session.
Feb. 11th	"	a.m. Discussions with the Administrator.
Feb. 12th	"	p.m. Committee members made individual inspections of the Island.
Feb. 14th	"	a.m. Discussions with the Administrator and B.P.C. Manager.

Feb. 15th	Nauru	a.m. Informal meeting at Domaneab with Nauruan Councillors.
		p.m. Departed Nauru by S.S. "Tri-Ellis".
		During the voyage informal discussions took place with the Master, the Chief Engineer and the Chief Officer.
Feb. 24th		a.m. Arrived Geelong.
" "	Melbourne	Discussions with B.P.C. officials.
March 12th	Sydney	Committee meeting.
March 17th	Canberra	Committee meeting. Meeting with Mr. G. Warwick Smith, Secretary, Department of Territories.

SECTION TWO

SUMMARY OF CONCLUSIONS

(a) The Committee, having carefully considered the terms of reference and the background to those terms in the light of the submissions tendered by the Nauruans and the discussions between their representatives and the Australian officials at Canberra in May/June 1965, has reached the following conclusions :-

(i) that while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable;

(ii) that it would, nevertheless, be practicable to undertake certain treatment of the mined areas, or parts of them, which would effectively induce a more attractive environment and would provide lands which would be suitable for habitation or other public purposes, including limited cultivation;

(iii) that any proposals for the Nauruans to continue to live on Nauru after the exhaustion of the phosphate deposits must include provision for an adequate water supply and facilities for outside communication and trade;

(iv) that the most effective use of large sections of the mined areas would be to use them for the construction, as a single project, of a water storage system and an airstrip;

(v) that while it would be impracticable to completely restore the mined areas to provide an agricultural economy for the Nauruans, it would be valuable to revegetate some of them and to treat other limited areas for the growing of trees, vegetables, etc.;

(vi) that a system of land-use planning for the island is most desirable and would probably lead subsequently to the development of additional usable land which would become available as a result of the rehabilitation proposals.

(b) In the sections of the report which follow, the Committee discusses in detail the considerations, financial and practical, which gave rise to these conclusions and gives its assessment of the effectiveness of the various suggestions made, together with estimates of the costs involved.

SECTION THREE

TERMS OF REFERENCE

(a) The terms of reference of the Committee were "to examine

(i) whether it would be technically feasible to refill the mined phosphate areas with suitable soil and/or other materials from external sources or to take other steps in order to render them usable for habitation purposes and/or cultivation of any kind;

(ii) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;

(iii) estimated costs of any practicable methods of achieving restoration in any effective degree."

(b) The terms of reference also instructed the Committee, assuming it appeared to be feasible to achieve restoration along the lines referred to in the paragraph above, to :-

"(i) investigate the water resources of Nauru;

(ii) examine fully the possibility of growing in the areas to be restored, trees, vegetables and other plants of a utilitarian kind, having regard both to what was done in this way in the past and what might be most useful to the Nauruan people in the future."

(c) The Committee was asked to report its findings to the Nauru Legislative Council and the Administering Authority by 30th June, 1966.

(d) The word "economic" nowhere appears in the Committee's terms of reference but it seems clear both from the discussions preceding the appointment of the Committee and from the composition of the Committee itself that an evaluation of possible measures for rehabilitation of mined areas from an economic point of view is expected. Nevertheless the Committee's economic appraisal of various steps towards restoration of denuded lands must inevitably remain incomplete.

It is not possible at this stage to make unequivocal statements regarding the economic soundness of certain proposed measures as many of the objectives involved are intangibles which do not lend themselves to ready evaluation in dollars and cents. The only values which can be attached to many of these intangible considerations are those expressed in the actual decision-making process. Thus the objective of greater visual or climatic congeniality of the island, for example, is valued ultimately by what the parties concerned would be prepared to spend or forego, in order to achieve a specified degree of amelioration of the environment.

(e) The Committee has understood its function to be primarily the provision of information concerning technically feasible methods of treating worked areas, the costs and benefits of alternative treatments and the implications of such actions, with a view to assisting the Administering Authority, and the Nauru Legislative Council to make more informed decisions on the questions involved. The Committee has also attempted wherever possible to analyse the relative costs and advantages of alternative ways of pursuing particular objectives. It has not sought to impose its own valuations on such objectives by making firm recommendations for or against the acceptance of the expenditures involved in specific measures for land treatment.

(f) In accordance with the above interpretation of its terms of reference the Committee has concentrated on providing relevant facts, assessment and analysis and has not presumed to lay down policy or even policy recommendation. However, it considered it would be helpful to outline a set of measures for the treatment of worked-out phosphate areas which would be reasonable in terms of the costs involved and the contributions which would be made towards a sound and flourishing economy. The Committee has in its conclusions expressed its views on what might represent a reasonable programme of work for the treatment of mined areas. It has taken into consideration all the circumstances, particularly the future requirements of Nauru for residential and recreational space, food production, water supply and communications. It has further set out a number of recommendations concerning some of the immediate steps which should be undertaken if this programme were to be adopted.

SECTION FOUR

BACKGROUND TO REHABILITATION PROPOSALS

(a) The immediate background to the Committee's enquiry is seen in the negotiations between the Australian Government and the Nauru Local Government Council in 1964 concerning resettlement of the Nauruan people on Curtis Island off the Queensland coast. These negotiations failed to reach agreement on the terms of resettlement. The chief factor influencing the Nauruan decision not to accept resettlement on the terms offered appears to have been the desire of the Nauruans for their new home to be an autonomous and fully independent State, where their national identity could be preserved. The Australian Government was unwilling to cede full sovereignty over Curtis Island and wished to retain some powers, notably those concerning defence, quarantine and external affairs. Negotiations ended with the announcement by the Nauruan Local Government Council that it rejected the specific offer of resettlement on Curtis Island and considered it in the best interests of the Nauruans to remain on their own island. The question of rehabilitation of worked-out phosphate lands was thus raised, bearing as it did on the capacity of the island to provide a satisfactory home for the Nauruans whose numbers are increasing at a rate of more than four per cent per annum.

(b) Some two thirds of the total land area of 5,263 acres comprises worked-out or workable lands, and the denudation of this area of its thin covering of topsoil and its deep overlay of phosphate, leaves behind a forbidding and virtually impassable terrain of bare and jagged coral limestone pinnacles, standing some 15 to 40 feet high. The plateau area had in the past not been intensively used by the Nauruan people. The whole population formerly resided and still resides on the narrow strip of low coconut lands surrounding the island, comprising some 998 acres, and in the relatively fertile basin of about 154 acres surrounding the Buada Lagoon, a small lake at approximately sea level. The phosphate lands carried a vegetative cover ranging from sparsely growing and stunted trees to denser stands of tomano and wild almond with some coconut trees and pandanus in favoured areas. The main former uses of the phosphate lands - as a source of timber for canoes and thatching materials for hut construction and as a reserve for the hunting of birds, the only form of wild life on the island - are scarcely relevant to the present economic circumstances and way of life of the Nauruan people. The limited food produced on the uncultivated uplands obviously never made a significant contribution to the subsistence of the Nauruans. The very porous, thinly soiled phosphate lands would undoubtedly have been the first and most seriously affected in the recurring drought periods, and in any event the output on the coastal fringe in favourable years would have been inadequate for consumption requirements. Today there is no sign that unmined land on the slopes of the plateau is being used for any form of productive activity except for a very small area which is under cultivation as a vegetable garden by Chinese members of the B.P.C. work force. The crops being grown there include melons, marrows and snake beans. Growth is poor, despite the favourable rainfall conditions being experienced, and soil erosion is apparent. However it is reported that during the Japanese occupation of the island in the years 1942 to 1945, pumpkins and sweet potatoes were grown on the phosphate lands in some areas, with the use of nightsoil.

(c) The concern of the Nauruans over the denuded condition of the phosphate-bearing lands after mining is not so much because of any loss of currently useful production there but because of loss of opportunities for future utilization of these areas for habitation, agriculture or other purposes. It was estimated that these reduced opportunities would become a more serious restraint upon the Nauruan economy as population density on the island increases substantially above present levels. Difficulties would also occur when and if reduced dependence upon imported foodstuffs became necessary or desirable.

(d) An additional consideration put forward concerns the effects of exposed pinnacles upon the congeniality of the island as a place to live. The stark expanse of pinnacles in worked-out areas is reminiscent of some gigantic prehistoric burying ground. The pinnacles darken with exposure and, as they present to the sun a much larger surface area than level ground, they absorb and subsequently give off much more heat than the land in its original condition with its vegetative cover. This, it has been suggested, makes conditions far less pleasant in the immediate vicinity and is likely to have adverse effects upon precipitation especially during periods of light cloud cover.

(e) The question of possible rehabilitation of worked-out phosphate areas has several times received attention in the past, and it became more pressing when the Nauruans decided, in 1964, to remain and continue to make the island their home. Two earlier investigations have been made. The first was made in 1953/54 by the Land Research and Regional Survey Section of the Commonwealth Scientific and Industrial Research Organization. The second was carried out by the British Phosphate Commissioners in 1964/65 at the request of the Australian Government, following the rejection of the offer of resettlement on Curtis Island. Furthermore in the United Nations Trusteeship Council the possibility of refilling worked-out areas with imported soil has been suggested. It has also been the subject of questions from time to time by representatives who expressed their concern lest the absorption of the inhabitants into some other community resulted in fundamental changes in the Nauruan character.

(f) The C.S.I.R.O. study of the then present and potential land use on Nauru was undertaken at the request of the Australian Department of Territories. The C.S.I.R.O. was asked to report, inter alia, on the "physical and economic possibilities of regenerating worked-out phosphate land so as to make it useful for agricultural purposes in the future". The report stated that "it would be possible to level this worked-out land with the aid of explosives and heavy crushing equipment and it would be possible to import soil, e.g. as backloading from the mainland, but there is no certainty that the soil would stay on the surface and not be washed down into the crushed coral. Even if the plateau were to be resurfaced and maintained in this manner, there would still be the question of an adequate water supply to supplement rainfall. It is believed that any such scheme would be fraught with so much uncertainty as to final success and would be so expensive that it may be ruled out at once as a practical proposition for the widescale utilization of these lands."

(g) In 1964 the British Phosphate Commissioners made a preliminary estimate of the costs of levelling the limestone pinnacles and of importing and spreading soil, brought to Nauru as backloading on phosphate ships. They estimated that this would be $A73,140 per acre, giving a total cost of $A256 million to restore the 3,500 acres of phosphate lands. Slightly over half this sum comprised the estimated costs of procuring, loading and shipping soil from the Australian mainland or from New Zealand.

A supplementary examination of the comparative costs of obtaining soil from a Pacific island source, and transporting it by bulk carriers specially chartered for the purpose, was subsequently made by the Commissioners in 1965. Taking Fauro in the Solomon Islands as a hypothetical source of soil, the B.P.C. estimated that the costs of procuring, loading and shipping soil from such an island would be approximately four percent greater than the costs of backloading soil from Australia or New Zealand. The whole operation of levelling and resoiling the pinnacle areas would cost an additional $5.6 million on this basis. A detailed examination of the B.P.C.'s assumptions of requirements for resoiling and costing procedures has been made by the Committee.

(h) A submission concerning rehabilitation of the island was made by the Nauruans during the course of negotiations which took place from May 30th to June 10th 1965, between a delegation of the Nauru Local Government Council and Australian officials representing the Administering Authority. The Nauruan submission discussed rehabilitation, not in terms of the restoration of mined areas, but of supplying adequate land and water resources to provide a satisfactory future home for the Nauruan people. Rehabilitation of this nature could involve expenditures on the development of natural resources which would bring the plateau areas to a condition of far greater potential productivity than before. It was agreed during these negotiations to establish an independent technical committee, comprising a civil engineer, a university economist and a soils specialist to be provided by F.A.O. for the purpose of examining and reporting on this question.

SECTION FIVE

AGRICULTURAL ENVIRONMENT AND LAND USE.

The present and potential land use of a certain area depends mainly on the prevailing combination and mutual influence of the following factors:-

(a)	Climate:	temperature, rainfall, etc.
(b)	Soil:	physical, chemical and biological properties.
(c)	Agricultural Situation:	topography (relief, slope, position), hydrology (groundwater, flooding), erosion hazard.
(d)	Social and Economic Factors:	Influence on the social environment through irrigation, drainage, flood control, use of fertilizers, etc. Location, transport and marketing facilities, etc.

(a) The temperature of the area is very favourable for plant growth. The annual mean is about 81°F, with no more than one or two degrees variation in the means of each month. The daily temperature range varies only by 10° to 12°. The relative humidity is 70% to 75%. The percentage of sunshine is rather high. The potential evapotranspiration (i.e. the required quantity of available water for optimum plant growth to be provided by rainfall, irrigation and/or soil storage), is not very high; about 0.2 inches per day or 6 inches per month.

All these factors are favourable for plant growth. However, the most important climatic factor, rainfall, is extremely variable. The yearly rainfall varies from 180 inches (1930) to 11 inches (1950). In most years the highest rainfall occurs during December, January and February, but during these months the rainfall can vary between more than 20 inches, (with a probability of once in 10 years), and less than 1 inch (with a probability of once in 5 years). Moreover, in some years there is no wet season at all and once in every 10 to 15 years a drought period (monthly rainfall of less than 2 inches) of 12 to 14 months can be expected. Nowhere in the tropical areas of the world is there such a variable and unreliable rainfall as in Nauru. For more detailed data and monthly rainfall probabilities see

Appendix II and enclosed chart.

(b) The very unfavourable rainfall factor is intensified by the prevailing soil conditions, especially as the plateau soils and coastal flat soils are porous. From moisture data obtained from B.P.C. it is estimated that the available water-holding capacity of the plateau soils is about 8% by volume, or 1 inch of water per foot of soil. The soils of the coastal flat have probably a still lower water capacity, but this factor is largely balanced by a favourable groundwater situation and in most places the roots of the coconut trees tap the groundwater, if it is not too saline. The top few inches of soil contain a little humic matter, which slightly increases the water-holding capacity and provides nitrogen and a more favourable soil composition for the supply of other nutrients.

(c) In view of the unfavourable combination of climate and soils on the plateau only drought resistant trees such as the tomano (Callophyllum Inophyllon), pandanus and wild almond can survive. Only in some places, such as near Anibare Bay, do coconut trees occur. However they grow here near the edge of the plateau in better water-holding subsurface depressions where the subsoil consists of phosphatic rock instead of coral. (Power, 1905). In these areas the tomano trees are much larger than elsewhere. If the plateau were covered with four feet of good soil, with a water-holding capacity of 2 inches per foot of soil, paw-paw, starchy food crops or vegetables could be grown in good years, but the unfavourable climatic factor would still make it impossible to grow coconuts on the plateau area. Even if they survived during favourable years they would bear little or no fruit.

During the wet season the plateau is more or less green, because in most places there are some leguminous plants, grasses and shrubs as well as trees. It is reported that during the Japanese occupation (1942-45) many pumpkins were grown on the plateau, with the aid of large quantities of nightsoil. In some scattered areas vegetables are now grown by Chinese labourers, using built-up beds of surface soil.

The agricultural situation of the flat coastal area is fairly good for growing coconuts, particularly near the edge of the plateau. The groundwater here supplies water and plant nutrients. The coconut tree is not drought resistant, but it can stand a fairly high saline content in the water; the roots are thick and very prolific and grow under favourable conditions up to thirty feet or more. (From a personal communication of Dr. Phillis of C.S.I.R.O., based on root excavations in Jamaica). These coastal flats are less suitable for vegetable production because they need good surface soil with a high content of organic matter and an ample and regular supply of water and plant nutrients. If dry periods continue for some months there would be no water, therefore vegetables could be grown only in the good years. However, the situation could be much improved with the use of additional plant topsoil, compost and fertilizers. Favourable soil and water conditions, especially for growing paw-paws, occur on the more gradual slopes between the flats and the plateau.

(d) The Nauruans could overcome these unfavourable conditions of climate and soil by agricultural education, the use of production incentives, and capital to provide the necessary irrigation, drainage and fertilizers. The future land use would therefore largely be determined by their decision on these matters.

Formerly the Nauruans subsisted mainly on fish and the products of the coconut and the pandanus. Because of the poor climatic and soil conditions, it is understandable that the Nauruans are not keen gardeners. They have no agricultural tradition, background or interest (C.H. Wedgwood, 1936; Report on Research work in Nauru Island). According to the Nauruans themselves, fishing is the only occupation in which they appear to excel. (Report on Nauru, U.N. Visiting Mission, 1962).

The isolated location of the island, far away from markets or regular boat services, rules out the possibility of improved future land use in the form of cash crops. It must be concluded that if it is decided to produce fruit and vegetables, experimental gardens, agricultural education and an extension service will be required.

SECTION SIX

POPULATION, LAND AND ESSENTIAL SERVICES

The population of the island is expanding and is expected to reach at least 9,000 by the year 1990. Such a population will tax the available land resources, and will result in a density of about ten persons per acre on the land suitable at present for residential use.

Apart from the necessity of enough living space, a population of this size can form a viable community only if it is provided with certain essential services.

Of these two are of major importance. The first is a water supply and the second communication with the rest of the world. Water is an essential "lubricant" of a modern society and ensures adequate health conditions and the facility for industrial activities. Particular attention has therefore been given to the provision of a safe and potable supply at minimum cost.

The only method of rapid physical communication with the world today is by means of large aircraft which require an adequate airport. It is fortunate that circumstances at Nauru are such that there could be a direct connection between these two essential services, water supply and airport, as the latter could act as a catchment area for the former.

The construction of an adequate water supply and an airport of international standard is discussed in Sections EIGHT (b) (iii) and (iv). of this Report.

SECTION SEVEN

THE NAURUAN ECONOMY AFTER EXHAUSTION OF PHOSPHATE DEPOSITS

(a) The indigenous population of Nauru is increasing at a rapid rate and this is expected to continue as the large number of Nauruans in lower age groups (born since the repatriation of Nauruans at the end of World War II) reach maturity. A projection of population trends made by demographers of the Australian National University indicated a likely population by 1990 of 8,000 to 9,000. If population expansion during the next twenty-five to thirty years were to enforce resettlement of the Nauruans on a larger island or their incorporation in the Australian community, the expenditures involved in rehabilitation of worked-out lands could, of course, prove to have been incurred unwisely. The Committee therefore thought it imperative to give some consideration to the capacity of the island to support and provide a satisfactory home for a population of 10,000 Nauruans by the turn of the century. Accordingly this section of the Committee's report examines the likely residential and occupational pattern on the island with 10,000 inhabitants. Amongst the questions taken up is the prospective ability of the Nauruan community, within the resources which will be available, to achieve a satisfactory level of living for all inhabitants.

(b) During the last several decades the Nauruans have enjoyed a cash economy and their dietary patterns and consumption of non-food items have undergone far-reaching changes. Even in 1957 a survey of food intake and nutritional levels carried out by the Nutrition Section of the Commonwealth Department of Health[1] revealed that European, non-indigenous native goods were consumed almost entirely. This trend towards dependence upon imported foodstuffs would appear to have continued and even intensified in the last nine years. The Nauruan diet is a high carbohydrate one, with imported rice and, to a lesser extent, wheaten flour and breakfast cereals providing the most important sources of energy intake. Relatively very little island produce is consumed and little attempt is made by the Nauruans to supplement imported foodstuffs with locally grown fruits and vegetables. Damage to gardens by the island's pig population, most of which are left free to forage unrestrained around the residential areas, is probably responsible for the observed shortage of pawpaws and other fruits and vegetables, which would be expected to do well on the coastal lands. The Committee was told that domestic pigs and poultry flocks, although evident everywhere, do not at present contribute in a major way to the diet of the Nauruan people.

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[1] Nancy E. Kirk, Dietary Survey of the U.N. Trust Territory of Nauru, Canberra, Nutrition Section, Commonwealth Department of Health, November 1957.

(c) In all probability, future food consumption habits will continue to be based around the imported staples, rice and wheat. The Committee does not consider it likely that the Nauruans will ever return to the kind of diet which could be provided from the island's own land resources, with or without soil importation. There is, however, considerable scope for production of supplementary foodstuffs on the island, which could make a very desirable contribution towards enriching and diversifying the diet of the inhabitants. Increased production of protein-rich livestock products, such as eggs and poultry meats, fish and to a lesser extent, pigmeats, will also probably involve a relatively high import component for animal foods.

(d) The Nauruan economy will also depend heavily upon imports of plant and equipment, constructional and building materials, motor vehicles, electrical equipment and other consumer durables, fuels and oils, textiles and apparel, medecinal drugs and chemicals and finished consumer products of many kinds. The capacity of the economy to pay for these essential imports will probably depend, however, more on the proceeds of overseas investments made by and on behalf of the Nauruan people than on overseas earnings from merchandise exports, receipts of overseas currencies from tourism, etc. The prospective amounts to be earned by investment of phosphate royalties, including the amounts credited to the Nauruan Community Long Term Investment Fund, overshadow the likely future importance of export income in the balance of payments situation and constitute a most favourable factor in the external balance of the economy.

(e) It has been calculated that at a compound interest rate of 5 per cent per annum, and with payments of $1.60 per ton into the Nauruan Community Long Term Investment Fund and an extraction rate of 2.5 million tons annually, the total capital sum accumulated by 1990, the date at which deposits would be exhausted, would amount to about $202 million. On the basis of an income yield of 5 per cent per annum, this investment would produce approximately $10 million annually and this sum would be available to finance Nauru's overseas expenditures on imported goods and services. On the basis of the same rate of contributions from royalty payments to the Nauruan Community Long Term Investment Fund, viz. $1.60 per ton, 5 per cent interest rate and an extraction rate of 1.6 million tons per year, the accumulated sum at exhaustion of the deposits in 38 years time would amount to $263 million approximately. The income yield from this sum, at 5 per cent per annum, would be $13 million annually available for partial support of the Nauruan community and specifically for imports and overseas payments (or for reinvestment if not required in full for this purpose). The current rate of royalty to the Nauruans includes only 85 cents per ton as payment into the Community Long Term Investment Fund but the Committee understands that this rate is expected to rise along with direct royalties to landowners in future years. The purely hypothetical figure of $1.60 per ton has been used above to illustrate the order of magnitude of external receipts from community investments abroad which could be available after exhaustion of the phosphate deposits on the island.

(f) In addition it seems reasonable to expect substantial private investment in overseas portfolios or equities to take place during the next twenty-five to thirty-eight years from the increased incomes received by Nauruan residents from phosphate royalties. The Committee has no information concerning current average or marginal propensities of the Nauruans to save, and even if known, these would possibly be of little value in predicting future rates of capital accumulation and foreign investment from their disposable incomes. No estimates have been made, therefore, of supplementary contributions to the future balance of payments from this source. It will be noted, however that the prospective investment incomes, cited above, are minimum estimates and could well be substantially exceeded if augmented by private capital outflow from Nauru during the period from now until the phosphate deposits reach the end of their life. The assumed interest rate or dividend yield of five per cent per annum may conceivably be exceeded, but any expenditures by the Nauruans from the capital sum accumulated would reduce subsequent receipts of overseas currencies from this source.

(g) The Committee has not made detailed predictions of necessary future import expenditures. However the ability of the Nauruan community to live within its prospective investment income abroad seems quite assured. The sum of $A1000 to $A1300 annually per head, which will be available from overseas investment at the turn of the century for a Nauruan population of 10,000, would appear more than adequate to cover essential imports of foodstuffs, annual feedstuffs, raw materials, fuels, plant and equipment and finished consumer goods. It would also appear ample to provide for all overseas expenditures necessary for such items as education, overseas travel by Nauruans, overseas remittances of foreign workers and consultants employed on Nauru. This may be gauged from the fact that in Australia, with a relatively high average propensity to import (14.1 per cent of Gross National Products in 1964-65), the c.i.f. value of merchandise imports amounted to only $A265 per head in 1964/65. Nauru, in the year 2000, would still be able to have, from this source alone, a per capita national income as great as that enjoyed by Australia in 1964-65 if all goods and services used were imported. If Nauru were successful in reducing the proportion of imports to total available goods and services to 50 per cent, she could have by the year 2000 a per capita income twice the current Australian level, even given population growth from 2600 to 10,000 in the next thirty-four years and assuming no export income whatever. This average propensity to import should certainly be within the power of the Nauruan community to achieve as should be substantial earnings of overseas currencies from exports, tourist expenditures and the proceeds of private investments abroad.

(h) To date import-saving production has not been stressed on the island nor has the development of local production. Most employed Nauruans are engaged in government service. Of 700 Nauruans in employment at 30th June 1965, 438 worked for the Administration, 140 with the British Phosphate Commissioners, 39 with the Nauru Co-operative Society and 66 with the Nauru Local Government Council; there were 17 others including those self-employed. The Committee realizes that this occupational distribution is explainable by the lack of incentive to develop local industries which existed while resettlement of the Nauruans was regarded as necessary for their future wellbeing. However the situation is not without its dangers. Emerging countries in which the skills developed in indigenous people were unduly concentrated in white collar occupations, have not always subsequently enjoyed satisfactory rates of economic growth. While the policy of providing employment in the Administration or B.P.C. for all Nauruans able and willing to work contributes to their short-term welfare, its long-term implications for the dynamics of the island economy could be adverse.

(i) Vigorous efforts will be necessary to develop enterprise, management and supervisory skills in industry and commerce amongst the indigenous people. Some favourable signs of development in this direction were noted but much remains to be done during the next two to three decades if the economic advancement of Nauru is to proceed satisfactorily. Protective tariff policies may well be necessary in some fields to encourage development of local industry. Some immediate possibilities worthy of examination are the manufacture of cement bricks, tiles and building materials; establishment of a cordial-bottling plant; filled milk processing, bottling and distribution (reconstituting imported non-fat milk powder and adding vegetable fats possibly from coconuts as is done in the Philippines). All of these enterprises would save import expenditure, and prima facie, would seem well within the capacity of the island to operate successfully.

(j) Tourism could also constitute a major industry and source of additional overseas currencies. The establishment of a full-length sealed airstrip on Nauru would make a tourist industry possible, provided investment were made in entertainment and recreational facilities. These should include modern hotel accommodation or lanai-type apartments and possibly the construction of a beach at Anibare Bay.

(k) Fish canning and inter-island shipping services have also been suggested as possible industries to contribute to economic activity and income on Nauru after the cessation of phosphate mining. Copra production could also be undertaken but as by the turn of the century the coastal strip (the so-called coconut lands) will be intensively occupied for residential purposes, production of this crop would probably not be substantial. Restored plateau lands could be used for copra production within the limits of water available for supplementary irrigation during dry spells. However, other competing land uses, such as the production of taro, sweet potatoes, yams or cassava for pigfeed or irrigated fruit and vegetable growing for human consumption would probably outbid copra for this area. A copra yield of half a ton per acre is regarded as good and would probably be substantially more than what could be achieved on refilled phosphate land. If yields averaged, say, one quarter of a ton per acre, 400 acres of refilled plateau land would yield only 100 tons of copra annually, giving a gross income of about $A16,000. In comparison production of tubers for pigfeed could yield up to 2,000 tons annually, which would save grain imports to a value several times this amount. Moreover intensive poultry production, based on caged laying houses of the Californian type and modern broiler chicken units, although requiring little land for island self-sufficiency, would offer much higher returns to land for part of this area. Intensive pigmeat production would make similarly modest demands on Nauru's land resources and could incidentally support economic activity in the form of a small abattoir and meat works with possible development of bacon and smallgoods production. Growing of orchids for the export market would be another feasible industry if air services to the United States call regularly at Nauru after establishment of an international airport.

The Committee concludes from this preliminary and somewhat superficial examination of the economic prospects, that given a water supply and improved communications and with investment income of the order postulated above available to them, the Nauruans could enjoy a very satisfactory level of living on the island. Opportunities for gainful employment of the growing population need not be lacking although vigorous steps will have to be taken to promote indigenous enterprise and to establish an institutional framework facilitating economic development.

(l) Amongst the most obvious current institutional constraints to economic development are the lack of credit facilities and land tenure conditions. The Committee considers that special attention will have to be given to the question of land tenure if this is not to become a serious handicap to the economic advancement of the Nauruans. Land use on the island will need to be carefully planned. It should provide a satisfactory residential situation for 10,000 people, allow for recreational, educational, water conservation, transport and other public purposes and ensure availability of land for industry including the tourist industry, agriculture and horticulture.

(m) Already, the Administrator reports, schools on the island are suffering from inadequate playing areas and the location of the present airstrip in the heavily populated Yaren District limits the scope for provision of relief. In the Committee's view, a co-ordinated approach to land use planning is imperative and should be undertaken as early as possible. Employment of a well qualified town planning consultant would be desirable, as what is needed is not a piecemeal approach to problems as they arise, but careful and integrated planning of future land needs of Nauru for all purposes. Achievement of the island's potential as a tourist resort, the maintenance of desired standards of residential areas and the preservation of sufficient areas for industry and agriculture will depend heavily on the preparation and implementation of adequate town plan.

Problems requiring such planning will arise in the immediate future should the proposed use of plateau lands for water conservation and construction of an airport and civic centre be undertaken. A decision to resoil part of the worked-out areas would immediately give rise to conflicts of interests amongst landowners and other sections of the community unless these are resolved by a carefully planned public policy for the whole of the island's land resources.

SECTION EIGHT

POSSIBILITIES FOR TREATMENT OF MINED PHOSPHATE AREAS

(a) Many industries and the extractive industries in particular are characterised by external diseconomies or spillover effects. In mining, in the exploitation of forest resources and in many other fields of activity the decisions of individual operators or firms often impose costs, including curtailed opportunities, on other parties. Disposal of waste products which can result in stream, atmospheric or other environmental pollution is a common case.

The social aspects of such spillover effects have received increasing attention during recent years. It has been recognised quite clearly that "what's good for General Bullmoose is not necessarily good for Uncle Sam". Consequently many regulatory measures have been introduced requiring that those who carry on extractive industries or create waste products take steps to avoid or minimise adverse social consequences of their operations. In beach sand mineral extraction and in both open cut and underground coal mining, for example, it is now general for land treatment to be required. In the beachmining industry in Australia restoration of areas disturbed in mining operations is mandatory. These practices are designed to preserve the natural environment of the coastal areas for the general public. Similarly in forestry there are regulations regarding replanting, cutting and the destruction of young trees.

There has developed, therefore, a climate of opinion in which the need for controls to obviate destruction and pollution of the natural environment is accepted, and restorative treatment of affected land is the responsibility of the extractive industry. It is not the Committee's responsibility to recommend who should bear the cost of any treatment of worked-out phosphate lands undertaken on Nauru, but it would seem consistent with the general trend in regulatory policies for extractive industries to require such treatment to be a responsibility of the phosphate-extractive industry.

Elsewhere in the world phosphate mining appears not to have been subject to the same kind of regulatory requirements for land restoration or rehabilitation as other kinds of mining operations. This is undoubtedly because the difficulties and costs involved make treatment of worked-out phosphate lands generally unecomic, particularly where the phosphatic material is right at the surface and there is no overlay of soil which can be conserved for subsequent restoration of exposed areas. Thus the Monsanto Company in the United States concluded, after a programme of experiments in conjunction with the University of Tennessee, that in such areas "the only way of putting this land into its former condition would be to haul soil in by trucks from some other location. This we consider as uneconomical and unrealistic as the costs would be more than the possible value of the land for agricultural purposes".

This finding should not, of course, be interpreted as a blanket rule against treatment of worked-out phosphate lands. Conditions vary and there are some very special circumstances affecting the Nauruan case, notably the limited land and other resources of the Island and the fact that mining operations will lay bare two-thirds of the total land area. Moreover agricultural use is not the only possible objective for land restoration, and even if uneconomic for this purpose, there are many possible alternative methods of treatment.

Informed decision-making about the treatment of areas stripped of phosphate calls for consideration of the full range of alternative treatments. The end-use desired and the costs involved largely determine the choice of alternatives. For some purposes, such as water catchment and storage, airport and road construction, a soil cover will not be necessary. For other purposes, such as public buildings, residential and recreational areas, only a modicum of soil cover is needed. For agricultural production, rehabilitation would require a deeper covering of soil to be placed on treated areas (together with, for many types of crops, the provision of supplementary irrigation water). For greater environmental congeniality much could be achieved by revegetation of worked-out areas, without or with a minimum of resoiling treatment.

(b) The adequacy of the residual land base to support an economically and socially flourishing community, having regard to other resources available to the Nauruans, is a major consideration in determining the requirements for, and the usefulness of, various forms of treatment of worked-out areas. For this reason the Committee's report examines a series of alternative land treatments, designed not so much to restore land to its original condition but to contribute usefully to the future of the Nauruan economy:-

(i) complete refilling of worked-out areas by levelling and spreading imported soil;

(ii) levelling of pinnacles and use of local materials to resoil part of the worked out areas;

(iii) construction of an airport on worked-out phosphate land to release land on the flat coastal strip;

(iv) construction of water catchment and storage on the plateau;

(v) revegetation of exposed limestone pinnacle areas.

These alternatives are examined as follows:

(i) By the time mining of Nauru's phosphate deposits is completed, some 90 million tons of material will have been removed from the island. Rehabilitation of worked-out lands by simply importing an equal quantity of soil to replace phosphate would be one conceivable method of restoration. However, as costs would substantially exceed the net value of the phosphate to be removed, this course has been ruled out at the outset as not offering a practicable alternative,

(ii) As crushed limestone from the pinnacles is a much cheaper source of fill than imported soil the most satisfactory method of restoring areas for habitation, cultivation or any other purpose requiring a uniform surface and soil cover, would be first to knock down, level and consolidate the limstone pinnacles and then to spread soil over the areas so levelled. The method envisaged for this operation would involve:-

: the use of two heavy bulldozers to knock down the pinnacles at about one third of their height from the base and to grade and traverse areas in order to crush and consolidate the material from the broken pinnacles;

: the excavation and crushing of limestone from a site where excavation is required, involving the importation and setting up of a large capacity crushing and screening plant;

: the level filling of areas graded by the bulldozers with crushed material and screenings;

: the acquisition and shipment of soil to Nauru either as backloading on phosphate ships from mainland Australia or New Zealand or on special bulk-carrier vessels from a Pacific Island;

: the unloading of soil into skips or barges and landing of it on the island in a specially constructed boat harbour;

: the cartage of soil to the plateau areas there to be discharged, spread and compacted.

The estimated costs of these operations have been detailed in Appendix III, and the technical problems are emphasised, particularly those associated with sloping land, which is analysed on the drawing accompanying the report, and forms some forty-two per cent of the area of Nauru.

(iii) The provision of an adequate airport can be made only on the mined phosphate lands. The present airstrip on the coastal fringe, which was constructed by the Japanese Army during the 1942-45 war in the Pacific, is too small in dimension and it cannot be extended. In any case the land on the coastal fringe is essential for living space.

A suitable location has been examined. It is immediately north of the Administration Settlement area, where it would be possible to build a strip 9,000 feet long and 600 feet wide. It would be formed by considerable cut and fill and the use of material excavated from the proposed reservoir.

The pavement, which would be liberal in area, would be drained, and the water gathered into a gallery running to the water storage tanks. There should be at least 120 acres of paved catchment.

The airstrip could be constructed in two sections, the second section to be completed after the working of the phosphates on the land. The first stage should be 5,000 feet long.

The area of land required for the airstrip, taxiway and clearance areas is estimated at 500 acres.

The estimated cost of the works, excluding buildings, lighting and navigational aids, is $A8,000,000. One half of the cost of excavating the water storage is included in this figure. If the water storage is not constructed, the estimate would increase to $A10,000,000.

(iv) The water supply for Nauru has been secured for many years by the importation, in times of need, of fresh water in the B.P.C. ships. Some of this water has been made available to the Local Government Council for distribution to the Nauruans.

From time to time it has been suggested that there is a possibility of ground water supply, or that desalination plants could be used to deal with sea water. No consideration appears to have been given to the collection of rain water falling on the island and storing it in a reservoir.

The island has an average rainfall of some 78 inches and an upland catchment of over 3000 acres. In theory there is some 20,000 acre feet of water available per annum which is sufficient to meet the needs of a large population.

Some investigations have been carried out to find out whether ground water is available. Drillings by the B.P.C. have indicated that fresh water can be found but only in very small quantities and the ground water table throughout the island is only just above sea level. Some details of the borings done are in Appendix IV.

There does not appear to be any reason why the uplands should not be used as a catchment area and for the storage of water.

An examination of the contour plans of the island indicates that there are two basins which could be enlarged by excavation and either of them could store up to 1,500 acre feet of water. (See map enclosed with this Report). The basin close to Buada lagoon is the more satisfactory. It would be necessary to line the storage basin as the limestone of the island is quite porous as is evident from the way in which rain falling on the island quickly disappears. The most economical form of lining would be reinforced gunite (i.e. sprayed cement mortar).

The storage could be filled from three main catchments, viz.:

(a) The surface of the storage itself;

(b) The paved surface of the proposed airport;

(c) Such areas of the pinnacle country which drained into a system of galleries driven from the top water level of the storage into the limestone.

The gallery construction would include collection holes drilled from the gallery, a sealed invert and a grouted interception zone above the invert lining. The main gallery would run from the airport location to the storage and carry the water collected from the airport surface.

A study of the rainfall records available indicates that a satisfactory water supply for a population of at least 10,000 can be obtained. Details of such a proposal with certain alternatives are in Appendix V.

Considerable and careful supervision would be necessary. The present method of collecting roof water, particularly that used on the latest type houses, should be continued and in fact be made obligatory, and a salt water reticulation system should be provided for operating the sewerage system and to provide for flushing and general cleaning.

The management of the supply would need to be careful and thorough to ensure that the maximum amount is available for spray irrigation whilst not endangering the safety of the main supply.

A brief study has also been made of the costs of water imports, as an alternative to construction of a catchment reservoir on the plateau. Delivery of water to the island as part of a regular shipping service would be necessary after the cessation of phosphate shipment in the absence of uplands water catchment. Such delivery would be combined with the storage of roof runoff and possibly with some surface storage. The details are in Appendix VI and it is clear that such a limited supply would be ultimately as expensive as a local supply of much greater capacity.

The use of a considerable area of the worked out lands both for storage basin and for collection of water to galleries is of tremendous importance to the continued existence of the expanding population on the island.

It should be noted that construction of a large storage will provide the necessary material for airport construction and for improvement of suitable land areas.

The creation of a lake with a surface area of 60 acres will also provide for the stocking of fish, and will enable water sports to be enjoyed in enclosed waters.

The resoiling of large areas of the mined phosphate land would not be satisfactory, for the likely yield of water to the galleries would be reduced by the resulting increase in evaporation.

The estimated cost of a satisfactory supply as set out in Appendix V is $A20,000,000, or when carried out in conjunction with the airstrip $A18,000,000.

(v) Probably the least expensive treatment of the mined phosphate lands would be to accelerate artificially the natural regeneration of vegetation upon exposed pinnacle areas. Although this would achieve only some amelioration in the appearance of the island landscape and perhaps some reduction in heat radiation and rainfall (by deflecting air currents rising from the pinnacles), it might be the most rational programme for considerable areas on the plateau. It particularly merits consideration where slopes are steep enough to present extreme erosion hazards for resoiled areas.

In newly mined areas the pinnacles are white and glaring. Mechanical extraction of phosphates from between the pinnacles is completed by hand "scratching" from the sides and bottoms of the holes. Nevertheless considerable amounts of phosphate material are left in pockets at the foot of the pinnacles or adhering in some places to the sides. With the passage of a few years the exposed pinnacles turn dark and some vegetation begins to appear. This process of natural vegetative invasion of mined areas is very slow and even on the old German workings (areas mined before World War I) the cover was far from complete. However, the Committee saw the worked-out areas at an unusually favourable time, i.e. at the end of the monsoon period and following a year of substantially above average rainfall.

In the long run even vegetative growth which substantially perishes in drought will yield organic material of value to future plant establishment. Seeding of creepers and legumes amongst the pinnacles would greatly accelerate this process. Hand planting or aerial broadcasting of wild almond and tomano seed would also speed up the establishment of a cover of vegetation. The tomano tree has very useful characteristics for this purpose. It establishes freely from seed, especially where some organic materials such as fallen leaves are present; it is drought resistant, provides valuable shade, and will establish in small pockets of soil or phosphate. The similar capacity of the wild almond to establish on the most unfavourable terrain offered by the pinnacle areas is noted by Sir Albert Ellis. He observes that "the tree is remarkably hardy, and the nuts dropped here and there in the old phosphate workings (of Ocean Island) speedily germinate and grow well under adverse conditions. The wild almond is thus helping to revegate what is at present an unsightly feature of the island".[1] The seed of these trees is too large to be disseminated over the worked-out areas by wind or birds and the Committee observed from its inspection of the island that revegetation was generally most advanced near the fringe of worked-out areas of any given age.

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[1] A.F. Ellis, "Ocean Island and Nauru; Their Story" P.25. Angus and Robertson Limited, Sydney.

The following possible ways of accelerating revegetation by hand-planting or by mechanically dispersed seeds should be examined:

Hand-planting of trees in the holes between pinnacles. The obvious course, if practicable, would be to perform this task during the manual extraction of phosphate not recoverable by mechanical grab.

Pelleting of tomano, wild almond, or other appropriate seed, in for example small bags of soil or compost with the addition of fertilisers, if found worthwhile. Bags could be of hessian, paper or other materials, or the pellets could be compacted and/or bound with a light spray of bitumen. The best method for plant establishment would have to be determined by experimental trials. Labour costs of distributing seed and a portion of handplanting young trees in worked areas could be relatively high because of the extreme difficulties of access to, and traverse over, pinnacle areas. Better establishment rates might be achieved by planting young trees in the holes with the addition of small quantities of soil or other material. This would involve the establishment of a nursery.

Systematic "potting" of trees in local or imported soil deposited here and there amongst the pinnacles during the mining process.

Planting with legumes and creepers to encourage tree establishment. Rampant growth of legumes and creepers occurs on the plateau during periods of favourable rainfall, indicating the ability of these species to thrive under conditions of very limited soil and in practically pure phosphate deposits. These plants might be employed to condition the pinnacles areas for subsequent tree establishment; they could also contribute directly to reduced heat radiation. Trials should be conducted to assess the influence of a preliminary legume "crop" (or of several repeated "crops"), on the efficacy of tree planting or seeding operations.

The erratic nature of rainfall will largely determine the most suitable method, or combination of methods, of revegetation. It could rule out the apparently most convenient and cheapest procedure, i.e. seed placement or tree planting during working of the phosphate lands. Phosphate extraction proceeds throughout the year whereas seeding or planting operation should coincide with the onset of the wet season and might be deferred with advantage in drought periods.

The costs of covering the pinnacle areas by these methods would be very small compared with the costs of alternative restorative treatment. Even if a tree nursery, seed packaging or pellet-making plant had to be established and aerial distribution employed, the costs are unlikely to exceed a few hundred dollars per acre. Although the introduction of scattered pockets of soil, (allowing 2 tons per tree), amongst pinnacles would increase costs, especially if imported soil were used, the planting of 100 trees to the acre would cost only about $A2,000 per acre.

An accurate assessment of benefits can be made only after experimental work on methods of establishing a vegetative cover over the island has been carried out. If this is successful the benefits would be almost as great as those gained from far more ambitious treatment of worked-out areas, except for access to all parts of the island and some recreational uses of land. Trees growing on worked-out areas could provide a home for the noddy birds, whose preservation is valued very highly by the Nauruan people. They could also provide the vegetative blanketing of the uplands necessary to prevent the probable deflection of rainbearing clouds and for more congenial climatic conditions and appearance of the island.

The Committee cannot give any authoritative assessment of the validity of the claim that exposed pinnacles tend to reduce rainfall precipitation on the island. Some observers have suggested that on an island of such limited area the rainfall and climate generally will necessarily be that of the surrounding ocean. A study of rainfall records shows that the aggregate rainfall during the twenty year period 1926-35 is identical with that for the twenty year period 1946-65. Although this would suggest that the increase in the area of exposed pinnacles, now representing about one third of the total plateau area, has not adversely affected the rainfall, such a conclusion would be statistically unwarranted. On the other hand, numerous observers who are resident or who visit the island regularly, claim that they have frequently seen clouds divide over and skirt the island, especially when the cloud cover was light or broken. Reportedly this phenomenon is even more pronounced at Ocean Island where a larger proportion of the phosphate deposits have been removed than on Nauru. The observed deflection of cloud movements is said to occur too regularly to be due to random influences and is attributed to the presence of hot air currents rising from denuded phosphate areas and otherwise dry areas. Although it is not possible to be conclusive about the matter, on the basis of available evidence, the Committee finds this latter hypothesis plausible and is inclined to accept it provisionally.

The seriousness of the potential loss of rainfall upon the island is dependent upon the extent to which the water resources of the island are developed. If the Nauruans were to be dependent only upon roof-catchment and individual storage tanks for each household, together with the limited ground water available at virtually sea level (which turns brackish during extended low rainfall periods), then any marginal reduction in precipitation during recurrent droughts would seriously affect the habitability of the island. If, on the other hand, adequate water storage for domestic, livestock, industrial and limited irrigation purposes were provided (or if dependable, low cost imports were arranged), it would be much less significant.

In September 1964 the Nauru Local Government Council raised with the Acting Administrator the question of using waste material such as fallen coconut logs, stumps, etc, as filling for pinnacle areas. No action emanated from these discussions as there was disagreement as to who should bear the responsibility for collection and cartage of such debris.

The current practice of the British Phosphate Commissioners in developing areas for working is to push surface soil, not required for temporary road construction, and redundant small timber and vegetation into pinnacle areas. This may not be the best method for the Nauruans but the practice is the minimum cost method of disposal. In the Committee's view all surface soil should be conserved for use in reclamation of the pinnacle areas either for the resoiling of levelled areas or for the systematic revegetation of unrestored pinnacle lands. Any top soil and waste vegetation not required for land reclamation should not be dumped indiscriminately, but carefully husbanded and placed in the pinnacle areas to make the maximum contribution possible to the establishment of a full vegetative cover over the island.

(c)(i) Even the direct costs of resoiling operations are extremely large per unit of area reclaimed. What, however, is the relationship of costs to the benefits which might be expected? An examination of this question led the Committee to the conclusion that direct benefits in the form of additional agricultural production would be relatively very small.

The benefits for habitation purposes would also appear to be limited as most of the population could probably be satisfactorily accommodated on the flat coastal strip and the hillside outside the 80 foot contour. The value of additional residential space, created by levelling and resoiling operations, would depend upon the extent to which the non-phosphate land, together with the area around Buada Lagoon, could provide adequate home sites for the future population.

(ii) Other benefits are of an intangible nature, not readily quantifiable in monetary terms. These include wildlife conservation and various aspects of environmental congeniality. Psychological or subjective considerations are relevant, such as the possible satisfaction to the Nauruans in preserving their traditional island home in its near-original state. It should also be considered that land on the plateau, by offering a change of environment from the flat coastal strip, could well diminish monotony and add significantly to the psychological satisfaction of life on a small and remote island.

No objectively determined values can be placed on these intangible factors by the Committee. Such values ultimately must be determined in the actual decision-making process. An analysis of direct benefits can, however, be a useful guide.

(iii) Any estimate of direct agricultural benefits must recognise that the possible agricultural uses of resoiled areas would be extremely limited, especially for areas where supplementary irrigation could not be provided. The frequent incidence of prolonged droughts, together with the lack of a water table on the plateau, would drastically restrict the possibilities for production of crops, especially tree crops such as coconuts. Even if coconuts could be successfully cultivated on plateau land with a covering of four feet of local and imported soil (at a capital cost of $A208 million for 3,030 acres) the annual yield of copra would almost certainly not exceed 800 tons per year; in the Committee's view it would probably be much less. Taking 800 tons as the long-term yield expectation for purposes of illustration however, the gross value of production would then amount to about $A130,000 (assuming an f.o.b. price of $A163 per ton) or only 1.25 per cent of the annual costs of resoiling the land (at an interest rate of 5 per cent). Clearly the net value of coconut production on resoiled lands (after deducting production expenses from gross returns) would cover only a negligible fraction of costs.

Vegetable, fruit and root crops for pigfeed production would be rather more productive and would also permit substantial cost savings by reducing the depth of soil cover necessary to, say, 2 ft. Some of the plateau areas could be used for intensive production of eggs and poultry and pigmeats as well as for specialized high-value crops such as orchids and other cut flowers suitable for export by air. The land requirements for self-sufficiency in these foodstuffs which would also allow for a sizeable export market in the latter commodities would not be great. Together with the intensive use for horticulture of the Buada Lagoon area, the resoiling of 300 or 400 acres with local topsoil, stripped from the phosphate lands before mining, should be more than ample to meet prospective land requirements for these purposes, especially if supplementary irrigation were available for such an area. Direct agricultural benefits from resoiling land in excess of this area would thus be negligible unless it were used for an export crop such as copra (which as already indicated would yield a very low rate of return on the large investment involved in resoiling).

(iv) The value of additional land, obtained for residential purposes by levelling and spreading imported soil on worked-out areas, would naturally be governed by the residential situation, which develops as population increases towards the 10,000 level. This in turn depends largely upon the use of "town" planning to ensure inter alia a rational use of the non-phosphate lands for residential and other purposes. Given intelligent planning of land use of the 1,737 acres of unworked land (998 acres on the coastal belt, 585 of rocky land and 154 acres around

Buada Lagoon), there should be adequate land for housing a population of 10,000 in individual family dwellings, without requiring anyone to live in high-density apartment houses. With an area of one-quarter to one-third of an acre per holding, 2,500 houses would leave sufficient land on the coastal strip and other unworked areas for other public purposes such as schools and recreational areas, commerce, industry and tourist accommodation. Intensive horticultural, agricultural and livestock production could be located around the Buada Lagoon, on selected portions of the coastal coconut lands and, if necessary on plateau areas resoiled with local materials. In these circumstances the values which could be imputed to residential benefits would also seem small in relation to costs. The residential situation would have to be much more crowded than it need be with reasonable planning of the island, to warrant expenditures of $A24,600 to $A34,600 per acre for this purpose (basing costs on a one foot cover of imported soil).

(v) In summary, the direct agricultural and residential benefits from resoiling the worked-out phosphate areas would be small in relation to the costs involved. No future land use would offset more than a fraction of the capital costs of resoiling land with imported soil. It would therefore be unreasonable to incur expenditures of the magnitude involved in resoiling the whole of the phosphate lands unless extremely high values were placed on the achievement of intangible objectives. There appear to be cheaper alternative treatments available for achieving many of these objectives, including increased visual congeniality, the avoidance of possible temperature and rainfall effects from exposed pinnacles and the conservation of birdlife on the island.

The Committee concludes, therefore, that even if resoiling of the whole of the worked-out areas with imported soil were technically feasible in the narrow sense of "possible with present or prospective technology but neglecting entirely considerations of cost", it would not make a contribution to economic and social life on Nauru commensurate with the costs involved.

The possible dangers arising from the introduction of soil from foreign sources, which could bring plants, insects fungi etc. capable of becoming pests and causing great damage and loss, are not to be overlooked.

(d) The alternative of utilizing only local soils as filling material has already been discussed to some extent as part of the preceding alternative, viz.: resoiling the whole of the worked-out phosphate lands with local and imported materials. It has been pointed out that, if no imported soil were to be used, it would still be possible, by conserving the thin covering of soil on the remaining undeveloped phosphate lands, to cover an area ranging from 119 acres with four feet of soil (at an estimated cost of $1.61 million) to 420 acres with one foot of soil (at an estimated cost of $2.87 million).

If the area reclaimed were intended for residential use, for public buildings such as schools and hospitals, and/or a civic centre housing the Legislative Council and Government departments, the limited quantity of local soil available could be eked out over a larger area than 420 acres. Soil need not be placed under residential and other buildings, parking areas, pathways and so on, but could be used for landscaping the general area. For this purpose "potting" of soil in garden beds, for lawns and tree planting could be sufficient, especially if the island's water supply were adequate to use on private and public gardens.

Assuming, with careful developmental planning of the whole area, that the soil cover were economized in this manner, it might be possible to treat an area of 600 to 700 acres by this method. Costs of land reclamation would thus be integrated with general developmental costs. An estimate of the separate costs, is as follows:

Estimated Costs of Landscaping 600 or 700 Acres of Worked-out Phosphate Lands with Local Topsoil

Acres treated	Levelling (a)	Landscaping	Soil Removal, Storage and replacement	Total
	$Am.	$Am.	$Am.	$Am.
600	2.5	0.6	1.3	4.4
700	2.9	0.7	1.3	4.9

(a) Assumes costs of knocking down pinnacles and filling with crushed limestone would be $A.4,150 per acre.

The estimated costs of resoiling 420 acres or of landscaping 600 or 700 acres of the mined-out fields, using local topsoil stripped from the unworked phosphate areas, are very modest in comparison with the costs of resoiling larger areas for which the use of imported soil would be involved. Moreover, in the Committee's view, most if not all the tangible benefits aimed at by a land restoration programme could be achieved by the treatment of these more limited areas. The benefits flowing from additional agricultural, recreational and residential areas would be substantially achieved by resoiling or landscaping. The extremely costly programmes necessary to proceed beyond this stage would result only in the intangible benefit of congeniality for the island as a whole.

The Committee considers that conservation of all surface soil and vegetative material on undeveloped phosphate lands should immediately be put in hand in order to maximise the areas which can be treated by using local materials.

Another possible alternative is the levelling and filling of the remaining worked-out lands with crushed limestone, without resoiling. This would give some benefits in the form of access, greater congeniality and reduced heat radiation from limestone exposed by phosphate mining. Compared with planting in untreated pinnacles, however, it could provide sites for industrial areas and perhaps for some types of public building but would not put land in a condition suitable for any form of agricultural production or for residential building. The cost would be approximately $A4,150 per acre. If 2,609 acres were so treated (i.e. the whole of the worked-out lands other than 420 acres covered with local topsoil and 470 acres occupied by airport, road and reservoir construction) the cost would be about $A10.8 million.

SECTION NINE

ALTERNATIVE POSSIBILITIES OF OBTAINING LAND BY RECLAMATION

(a) If the operation of rehabilitating mined-out areas is seen, as it must be, as the purchase of additional land for the Nauruan people, then it is necessary to weigh the costs of reclamation of plateau lands against the alternative methods of obtaining equivalent areas elsewhere on Nauru (or, if a suitable alternative home can be found which meets the required conditions of national autonomy, against the costs of resettlement).

For this reason the Committee considered the practicability of land reclamation by filling the reef area fringing the island, or parts of it. The coral reef, which is covered by the sea at high tide, ranges in width from about 400 to 1,000 feet. It would be technically possible to fill parts of the reef area with quarried limestone and to cover it with crushed rock and soil in such a way as to make it usable for residential areas. The possibilities of reclaiming land over the reef for agricultural purposes would not appear to be promising. Salt spray would be unfavourable to most forms of plant production. Even coconuts which are relatively tolerant to salt would be better grown elsewhere, especially as it would be difficult to provide conditions over the reef which would enable their roots to penetrate down to a fresh water table.

Moreover, the problems of sea-erosion of land so built on the reef platform would be most formidable. The reef fulfils the function of breaking down the energy of the periodic large seas which even now sometimes inundate parts of the coastal areas. Evidence of the power of the seas which sweep the Nauru coast is seen in the flooding of the B.P.C. "Location" Settlement for indentured labour and the damage to the very solidly constructed boat harbour on the western side of the island. A very heavy sea wall or ring of concrete "tetrapods" would have to be installed to protect reclaimed reef areas from rapid erosion. Such installations would be very expensive to erect especially as the work might have to be confined to low tide periods. A much greater depth of fill would also be required than on pinnacle areas. In most parts of the island the flat belt of coconut lands is some 15 to 20 feet above the reef at the shore, although it generally slopes backwards into depressed areas and on the northern side into shallow lagoons at the foot of the plateau. Obviously the costs of land reclamation per acre would be much greater on the reef area than on the worked-out phosphate lands. This method was therefore rejected by the Committee and is considered to have only limited application, if any, to the land problems of the island. It could perhaps be used in the construction of a sandy beach at Anibare Bay which would increase facilities for any tourist industry to be developed in the future.

(b) Another way of increasing the area available for residential and agricultural/horticultural purposes would be by levelling the coastal strip inside the raised level of gravelly sands around the extreme perimeter and filling the depressed areas along the foot of the cliff face including the shallow lagoons on the northern side of the island. These lagoons are currently used for fish-farming, the Nauruans catching small fish of the Ibia species on the reefs and impounding them in the lagoons along the inside of the coastal strip and in the Buada Lagoon. Should increased land areas on the coastal fringe be required in future for residential or cultivation purposes, it would be possible to fill the coastal lagoons and depressed areas by levelling the soil on the coastal flats or even by carting soil from the unworked phosphate areas on the plateau.

The areas involved are small and it is doubtful whether such measures should be regarded as part of a comprehensive programme for rehabilitation of the island or should simply be left for local action when, and if, considered desirable.

It is noticeable that coconuts seem to flourish more along the depressed areas at the back of the coastal strip and do not thrive near the ocean. This may be because near the sea the trees are growing some 15 feet or more above the water table, whereas further back towards the edge of the plateau they are nearer ground-water. It is also noticeable that stands of coconut trees are much too dense for high yields in these depressions and that fallen nuts, many of which are undersized, lie thickly around these areas where they have been eaten by rats. Should encouragement of copra production on the island be desired it is likely that steps to achieve more productive use of coastal coconut lands would offer a better alternative than attempts to establish intensive coconut production on mined-out areas.

SECTION TEN

CONCLUSIONS AND RECOMMENDATIONS

The Committee has concluded that any proposal to resoil the whole of the worked-out phosphate areas is unrealistic and presents serious technical difficulties because of the natural slope existing on the island. In fact it would not be in the best interest of the Nauruans to resoil large portions of land as they are of far greater value as absorption areas for water collection.

Considerable works could, however, be carried out on the denuded areas to provide for facilities essential to the future livelihood of the increasing population.

The facilities which are recommended and their estimated costs are:

(a) Water Supply system with a capacity of not less than 130 acre feet per month.

(b) An airport of international standard for large aircraft.
The estimated cost of (a) and (b) is $25,260,000 as detailed in Appendix V paragraph 11.

(c) Treatment of areas to provide land suitable for public purposes and for some residential areas other than the "fringe" lands.
The estimated cost is $3,500,000 based on treating approximately 500 acres using local soil as set out in Section 8(d).

(d) The revegetation of all lands not required for other purposes to improve the "congeniality" of the island.
The estimated cost is $2,240,000, based on the estimated Section 8 b V for some 1120 acres.

It is therefore estimated that an expenditure of $31,000,000 would provide facilities which would provide a basis for the useful development of the island, and the Committee recommends the provision of these works.

It is also recommended that steps be taken as soon as possible to plan the land use of the island completely, so that a population of ten thousand people may live and work in a complete and satisfying way.

The Committee considers that investigations and experimental work on water collection galleries, the propagation and planting of trees and shrubs, and the improvement of farming and husbandry of animals should also be given urgent priority by the Administration.

Signed G.I. Davey J.N. Lewis W.F. Van Beers.

APPENDIX I

This appendix sets out the dates of the various meetings of the Committee, including the visit to Nauru, and lists the names of the Government and other officials with whom the Committee had discussions and other individuals who kindly gave useful information to the Committee.

(a) Dates and places of formal meetings of the Committee

26th January, 1966	Department of Territories, Sydney
3rd February, 1966	Department of Territories, Canberra
4th February, 1966	British Phosphate Commissioners' Head Office, Melbourne
5th-24th February, 1966	At Nauru and en route to Melbourne
24th February, 1966	British Phosphate Commissioners' Head Office, Melbourne
12th-13th March, 1966	Department of Territories, Sydney
17th March, 1966	Department of Territories, Canberra

(b) Persons and Organizations with whom discussions were held or who gave information to the Committee

In Canberra - Department of Territories -

Mr. G. Warwick Smith, O.B.E. Secretary

Mr. C.E. Reseigh, Assistant Secretary (Social and General Services Branch)

Mr. R. Marsh, Director (International Relations and Information Branch)

In Melbourne - Office of the British Phosphate Commissioners

Sir William Dunk, C.B.E., Australian Commissioner

Mr. J.A. Bissett, C.M.G., General Manager

Mr. L.E. Ravenscroft, Deputy General Manager

Mr. T.A. Adams, Deputy General Manager (Christmas Island Development)

Mr. H.F. Cox, Assistant Chief Engineer

At Nauru - Office of the Administration

His Honour the Administrator, Mr. R.S. Leydin, O.B.E.

Mr. R.E. Vizard, Official Secretary

Mr. W.N.A. Allison, Director of Education

Mr. J.S. McConnachie, Director of Police

Island Management of the British Phosphate Commissioners -

Mr. W.B. Marston, Island Manager

Mr. L. Withers, Assistant Manager (Engineering)

Mr. B.J. Webb, Resident Civil Engineer

Mr. W.F. Avery, Second Assistant Mechanical and Electrical Engineer

Mr. R. Nevile, Assistant General Manager (Production), B.P.C. Head Office, Melbourne (visiting Nauru)

Elected Members of the Nauru Legislative Council -

Head Chief Hammer DeRoburt, O.B.E., M.L.C.

Mr. Austin Bernicke, M.L.C.

Mr. Roy Degoregore, M.L.C.

Mr. Edwin Tsitsi, M.L.C.

Mr. James Ategen Bop, M.L.C.

Mr. Joseph Detsimea, M.L.C.

Mr. Agoko Doguape, M.L.C.

Mr. Buraro Detudamo, M.L.C.

Mr. Victor Eoaea, M.L.C.

Others

Rev. Father P. Clivaz, M.S.C., Catholic Mission

On board B.P.C. ship - M.V. "Triellis"

Master - Captain G.G. Kitching

Chief Engineer, V.B. Brown

Chief Officer, J.R. Martin

APPENDIX III

Estimated Cost of Levelling and Resoiling

The method proposed by the Committee for levelling the pinnacle areas involves the use of two heavy crawler tractors fitting with bulldozer blades. The bulldozers working together would use both wedging and pushing actions to knock down the top two-thirds of the pinnacles, then cross the areas to rough level and pack down the broken material. The capital cost of two heavy type units, which would have to be dismantled to some extent before shipping to permit unloading with ship's gear, would be about $A220,000. The two machines would together deal effectively with 0.75 acres per 8 hour day. Based on Australian daily charges of $176 per day for each machine, including all capital and operating costs, the cost per acre for knocking down pinnacles would be of the order of $469 per acre, say, for Nauruan conditions $500 per acre.

2. The British Phosphate Commissioners have had no occasion to use heavy type tractors on Nauru but have used smaller bulldozers for developmental work on the island. The Committee is convinced that large bulldozers of this capacity would perform the task of knocking down coral pinnacles effectively and at a substantially lower cost than using explosives. This view has been confirmed by consultations with a demolition expert who had visited Nauru on other business.

3. In order to level the areas after knocking down the pinnacles and before resoiling, it woul be necessary to cover the area graded by the dozers with crushed limestone. Approximately 900 cubic yards of material per acre would be required, 500 cubic yards as 6 inch metal, 200 cubic yards as 1½ inch metal and a final 200 cubic yards of ½ inch to 3/16 inch screenings. Estimated costs of this work are as follows -

	$ per acre
Quarrying 900 cubic yards of limestone @ $1.50 per yard	1,350
Crushing, delivery and spreading of 500 cubic yards of 6 inch metal	1,000
Crushing, delivery and spreading of 200 cubic yards of 1½ inch metal	500
Crushing, delivery and spreading of 200 cubic yards of ½ to 3/16 inch metal	800
	3,650

4. The costs of procuring soil from an external source and its transport to ship's hold have been estimated by the British Phosphate Commissioners at $4.34 per ton if obtained from an island in the Solomons group or $4.59 per ton if obtained near Geelong in Australia. These figures are based on an annual rate of soil importation of 900,000 tons extending over a 25 year period. Although they appear reasonable on this basis and are unlikely to be reduced by importing soil from any other location, they probably underestimate the likely costs for the quantities needed, if the above method of soil spreading were used. Moreover the B.P.C. assumed that half of the soil would be subsoil. Average costs would be $0.50 per ton higher if this were not the case.

5. The Committee considers that if finely ground limestone were used as filling, washing in of soil into crevices would be reduced. The 3,500 tons (cubic yards) of soil per acre would then be sufficient to provide a soil cover 2 feet in depth (subject to the technical difficulties discussed below). This would mean total soil imports of only 9.8 million tons, assuming that -

(i) 470 of the total 3,500 workable acres are used for airstrip, reservoir and road construction and are therefore not resoiled; and

(ii) that 800,000 tons of local soil covering underdeveloped phosphate areas could be conserved and used for resoiling part of the island.

The per unit costs of soil procurement and loading would be rather higher for this quantity than for the 22,500,000 tons assumed by the British Phosphate Commissioners. This applies particularly in the case of soil imports from the Solomons, where substantial overhead costs of a jetty, cantilever loading arm, drying plant, storage bins and associated workshops, services and housing would have to be incurred. Accordingly the costs per ton of top soil loaded have been estimated at -

$5.20 per ton from Geelong
$5.00 per ton from the Solomons

6. The cost of transporting soil to Nauru by phosphate carrying vessels is chiefly the cost of the resultant slower turn-around of the ships involved. The B.P.C. estimate of $1.20 per ton for soil carried from Geelong is considered, for two main reasons, much too low. Firstly the unloading time of 5 days, on which this is based, is certainly inadequate, bearing in mind the nature of the operation which involves unloading soil from the ships' holds into containers on barges. An additional eight to nine days for a round voyage is the expected minimum, allowing for loading and unloading time and the slower return travel when loaded than in ballast. Secondly the assumed charter cost of $1200 per day for a ship of 12,000 tons D.W. (carrying 10,000 tons of soil) is too low as a long-term expectation. Accordingly the Committee has accepted as a more likely shipping cost the figure of $2.16 per ton for soil from Geelong. For soil brought from the Solomons by special bulk carrier ships, freight costs are estimated at $2.60 per ton. As total procurement and freight costs for soil obtained from this source would exceed costs of soil imported from Geelong or another port on the Australian mainland, the Committee's estimates of the aggregate cost of resoiling worked-out phosphate areas is based on the assumption that soil would be imported from Australia and not from a Pacific island.

7. The British Phosphate Commissioners' estimate of costs of discharging soil at Nauru, carting to fields, spreading and compacting was $2.04 per ton. This figure was derived by spreading overhead costs of boat harbours on the westerly and easterly sides of the island and other capital works necessary over a total quantity of 22.5 million tons. For a quantity of 9.8 million tons and in view of the longer time necessary to unload each shipload it is considered that a cost of at least $3.00 per ton (including approximately 70 cents per ton for transport to, and spreading on, the plateau) would be incurred.

8. Total costs of procuring, shipping, unloading and spreading imported soil would thus be $10.36 per ton, made up as follows:-

	$ per ton (for 9.8 million tons)
Procurement and loading	5.20
Freight from Geelong to Nauru	2.16
Unloading at Nauru	2.30
Delivery and spreading in phosphate fields	0.70
	10.36

9. An analysis, based on the 2 foot vertical contour plans of Nauru prepared by the British Phosphate Commissioners, reveals that of the 3,500 acres of worked or workable phosphate lands, some 1,500 acres have a slope exceeding 1 in 20. Such a slope is considered to be the extreme limit at which soil placed on levelled areas would remain in position without extensive erosion control measures such as contour terracing or the construction of suitable retaining walls or banks. Approximately 100 acres of steeply sloping land would be included in the area to be reclaimed for the proposed airstrip. The site for the reservoir consists entirely of flat land, i.e., a basin with a slope less than 1 in 20. Thus of the 3,050 acres of worked-out lands not required for airstrip and road construction or for the reservoir, 1,400 acres would be too steep for successful soil placement without special anti-erosion measures. The erosion hazards involved both during and after resoiling would present a major technical problem in view of both the intensity of tropical downpours (four to five inches of rain in an hour is not uncommon) and the extra susceptibility to washing and sheet erosion of introduced soil spread on a sloping rock base. The Committee considers that permanent and major erosion control measures would be necessary on all land with a slope of 1 in 20 and probably on many areas with less steep slopes. Accordingly estimates of total resoiling costs should include the costs of retaining walls or contoured rock terraces, estimated at approximately $10,000 per acre.

10. The total per acre costs of reclamation of the mined-out areas with imported soil would thus be as follows:-

Depth of soil cover	$A per acre	
	With slope less than 1 in 20	With slope exceeding 1 in 20
(a) 1 ft. (1900 tons/acre)	24,600	34,600
(b) 2 ft. (3500 tons/acre)	40,400	50,400
(c) 3 ft. (5100 tons/acre)	55,100	65,100
(d) 4 ft. (6700 tons/acre)	66,100	76,100

NOTE: Assumed costs of soil, spread on site, are -

(a) $10.60 per ton

(b) $10.36 per ton

(c) $10 per ton

(d) $9.40 per ton.

Cost of levelling and packing with crushed limestone taken as $4,150 per acre and cost of erosion control works on land of steeper slope than 1 in 20, $10,000 per acre.

11. The average depth of soil cover on the phosphate lands is reported by the British Phosphate Commissioners to be about five inches. Assuming that three inches of this could be stripped off during development for mining and conserved for land resoiling operations, the 2,000 acres (approx.) of undeveloped phosphate lands would yield some 800,000 tons of soil including all vegetative cover. This would be sufficient to resoil the following areas:-

Depth of soil cover	Area covered with local soil (acres)	Estimated costs (a)	
		$A per acre	Total area ($ million)
1 ft.	421	6,817	2.87
2 ft.	228	9,079	2.07
3 ft.	159	11,195	1.78
4 ft.	119	13,529	1.62

(a) Including levelling costs of $A4,150 per acre; removal and storage of soil from unworked phosphate lands at 70 cents per ton; delivery of soil from storage area and spreading at 70 cents per ton.

12. Costs of resoiling the remainier of the worked-out phosphate lands, excluding the 470 acres required for airstrip, roads and reservoir construction, would be as follows:-

Depth of soil cover	Area to be covered with imported soil	Estimated cost including erosion control	Cost of erosion control on 1,400 acres	Total
	Acres	$A million	$ million	$ million
1 ft.	2,609	64.2	14.0	78.2
2 ft.	2,802	113.2	14.0	127.2
3 ft.	2,871	158.2	14.0	172.2
4 ft.	2,911	192.4	14.0	206.4

13. By aggregating the costs for varying depths of soil cover, set out in the two preceding paragraphs, the following estimates of total costs of resoiling the island (making maximum use of local materials) are obtained:-

Depth of soil cover	Total cost of levelling pinnacles and resoiling (excluding airport, roads and reservoir sites)
	$A million
1 ft.	81
2 ft.	129
3 ft.	174
4 ft.	208

14. If the whole 3,500 acres of worked-out phosphate fields were to be resoiled, total costs would amount to:-

Depth of soil cover	Additional costs of 470 acres (a)	Total
	$ million	$ million
1 ft.	12.56	94
2 ft.	19.99	149
3 ft.	26.90	201
4 ft.	32.07	240

(a) Based on the assumption that 100 acres of the 470 acres suggested as suitable sites for an airstrip and a reservoir or required for roads would need major soil conservation works costing $10,000 per acre.

APPENDIX IV

NAURU

WATER EXPLORATION - B.P.C.

PRELIMINARY REPORT 1965

(See enclosed map and chart.)

INTRODUCTION

Following a consultation between B.P.C. representative and the Contractors, it was commonly agreed that preference be given to at least two to three 150' pattern holes so that aforehand information on the subsoil structure of the island be obtained when subsequently the deeper 500' geological holes are attempted.

The following holes, viz: H3, H7 and H8 were first chosen as these had been ready to commence the project. The basis of selection of the drill points on the island arises from consideration of pinnacle outcrops, and at the same time keeping in mind if and where there are forms of natural depressions.

The attached map of the island shows, in rough proximity, the positions of all the holes attempted together with their respective RL's.

Definitions

Honeycombs:	This term is loosely used to describe cavity formation in the coral, which is able to take away the air normally supplied to the borehole at approximately 300-400 c.p.m.
Small Cavities:	This term is loosely used to describe cavity formation, in the coral, which is not able to take away the air normally supplied to the borehole at approximately 300-400 c.p.m.
Cavern:	This term is used to describe underground hollows struck in coral.

HOLE H.3

Drilling commenced with a 6½" ∅ Bit. From 0' to 21', Drilling went through a reasonably consistently solid layer of coral formation at a rate of approximately 28'/Hour. A 3' deep cavern was struck at this depth where almost all returns were lost. The extent of it could only be guessed by the amount of air lost or by how much return was being brought to the surface. Drilling was continued past the cave for a further 27' throughout which depth it was 'felt' by means of the drill rods to contain small cavities or honeycombs. At this stage the return of air was lost completely.

Presumably the cuttings, intercepted by the cave in transit to the surface, would normally build up around the bore hole in the floor of the cavern and be liable to collapse back on top of the bit; or making it too difficult to clean out the hole. The Contractor felt that a certain amount of risk to the safety of his cutting tool was being run and it was considered appropriate from this aspect to case the bore.

Prior to casing, an inspection of the hole showed that at places in soft spots, the tool had drifted off centre by as much as two to three inches making the bore-hole too irregular and inconsistent. Subsequent casing using 6" O.D. steel pile linings was found too difficult to do.

Reaming attempt using an 8" Ø Bit failed when the top of the pinnacle began to crack. The hole abandoned and Rig moved to next site at Hole No. H7.

HOLE No. H7.

Respecting the difficulty encountered when casing the previous borehole, necessitated the use of the 8" bit to commence the hole.

In the first 35' the pinnacle appeared to contain pockets of phosphate alluvium, small cavities and honeycombs. At 49' a cavern 4' deep was struck and through which most of the chips were lost. Water was injected into the borehole confluent with the air blast in an effort to stabilize the loose phosphate alluvium in the bore wall. At 68' another cavern 2' deep was struck and the return of air and chips were lost completely. At 72' casing was decided by the same token effected at H3. Length of casing used approx. 72' and the operation took about 4 hours.

Water table was struck at 54' and found brackish by taste. From 72' to 83', chips were being obtained together with a substantial flow of water. Honeycomb formation was again met between 83' to 91' where all returns were completely lost.

Drilling was finally taken to a total depth of 124', and with no returns being obtained at the surface it was considered unsafe to continue drilling and the 6" casings were salvaged before the hole was abandoned.

HOLE No. 8.

Drilled to 8' but stopped when the pinnacle was found to be a floater. Rig was reset over new site in the general vicinity and drilling continued.

Honeycomb formation were struck at varying depths between 47' and 136'. Two small caverns 2'6" deep were struck at depths 62' and 136' respectively. Bore cased to 114'. In the process the 6" casing falls into the borehole under its own weight except at odd places where possibly small ledges protruding the bore wall had necessitated pushing with the machine head.

The water table was struck at 92' and appeared fresh to taste. The salt counter reading at 1520ppm. After redrilling to 114' the water was again tested and found to have just turned brackish. At 130' formation of small cavities was struck and at 136'6" a cavern 2'6" deep. The hole decased and abandoned at 139'.

HOLE No. H.10. Geological Hole.

The policy adopted here was to drill down as far as possible with the 8" Ø Bit, to within the safety limit of the cutting tool and then case the bore before following up with the 5½" Ø Bit.

Layers of honeycomb and small cavities generally lie at varying depths throughout the length of the hole, but predominantly between 8' and 42'. The proportion of these formations to the total depth drilled is 32.7%. The fines in the samples of the chips obtained from 35' to 40' appeared greenish-grey in colour and emanating a somewhat obnoxious smell when drilling.

The water table was encountered in a layer of small cavities or honeycomb at 101'. The water is brackish and the salt counter reading at 6950ppm. At 30' and 85' consecutively, the cutting tool came close to being trapped under formation collapse.

At 122' going through presumably a layer of very solid coral, the return of samples and chips were completely lost. However, drilling continued for a further 65' in the most careful manner to prevent the occurrence of another possible formation collapse. The stage was reached when at 187' it was deemed necessary to case. The 6" casing took nearly 5 hours to complete before the bore was rerodded and drilling resumed with a 5½" Ø Bit.

The return [illegible] together with a substantial flow of salty water reappeared immediately after the drilling resumed.

At 204' to 211' the drilling rate was almost tripled but slowed up again at 211'. At 236' 6" a small cavern 18" deep was struck. From 238' onwards to the final depth of 248', the cutting bit was following what appeared to be either a dipping crevice or a sloping wall of the last cavern presumed 18" deep. In the last 10' (238' 248) drilling was gradually departing from the general direction; and at any rate the return of samples disappeared that it was pointless to continue drilling the hole for which purpose it was required.

After withdrawing the casings, the Contractors were requested to attempt reaming the bore using the 8" Ø bit to establish the possibility of a future development on the hole when it is required. Reaming operation extended from 187' to 192'. The hole abandoned and Rig moved to next site at H4.

HOLE No. H4.

The policy adopted at this stage, after failing the exploratory hole at H10, was to treat each subsequent hole a potential geological hole, and attempts be made where possible to sample all footage.

In the first 8' the surface pinnacle appeared to be consistently solid. At 8' a 4' deep cavern was struck and returns were almost completely lost. The venturi action, at the top of the borehole with the air blasting at cave level indicated the extensiveness of the cavern.

Honeycomb formations were found more closely together at varying depths between 19' and 40'. Two other honeycomb formations were encountered further down at 58' and 78' respectively. The proportion of these formations to the drill depth is about 20.4%.

The water table was struck at 93' and it showed a salt counter reading of about 5400ppm. This is just susceptible to the taste.

The hole was abandoned at 103' because it became too difficult to be cleaned and it was much too irregular throughout for casing.

HOLE NO. H5.

The proportion of honeycomb and cavern formations to the total depth drilled is 16.5%. These formations were struck at 30' to 38', 48' to 54' and 83' to 84' inclusively. The return of air and samples were completely lost at 30'. Despite persistent efforts to clean out the borehole at 46', the cuttings accumulated to 7' from the bottom of the hole. With the tool bit drilling under 7' of cuttings made it risky to change rod as this would mean turning off the air blast to the bit enabling the cuttings to settle back on top of it.

As a remedial measure, half a cubic yard of wet mix H.E.S. concrete was poured into the bore hole in the hope of sealing off the cavern formation and thereby promoting the passage of the returns. However, the remedy was soon defeated when at 48' two large caverns were struck.

The water table was struck at 72' and the first sample obtained read 1000ppm on the salt counter.

Final depth drilled to 91', our later inspection showed that the borehole had followed two distinct bends at opposite hand. This of course jeopardized the opportunity of making the hole a geological one.

Hole abandoned.

SUB HOLE NO. H6D.

Three holes were tried but abandoned at 8', 6' and 23' respectively, being coral floaters, some containing pockets of phosphate alluvial.

The fourth pinnacle was drilled to a total depth of 149'; 30.9% of which was honeycombs and caverns including two strata of soft material at 18' to 19', and 61' to 67' inclusively. In these materials drilling rate had almost tripled. Air return was lost through 4' deep cave struck at 28'.

The borehole cased to 64' and further 3' was later pushed with the machine head into the soft stratum at 61' to 67'. Cleaning of the hole and consequent sampling became effective again until a 13' deep cavern was struck at 101'. Water table was struck at 128' and the sample appeared salty to taste.

Hole abandoned but casing was left in bore hole to prevent formation collapse.

HOLE NO. H2.

There being no pinnacle within general vicinity of site, drilling commenced firstly through a 2' layer of black silty topsoil, 11' of phosphate alluvium, 3' through a rock phosphate floater, 2' of phosphate alluvium again 18' to 23' honeycomb in coral, and from 23' to 24' into a hard stratum when at 24' the hole was abandoned.

As seen drilling through phosphate alluvium near the surface, the tool bit was smothered under the partially suspended mass of loose cuttings which surface keeps bobbing in the escaping air. This was probably how the tool bit was jammed in several places at hole H.10. However, the machine was able to clean out 7' of the first 13' and the resultant hole, being oversize, rendered it possible to case with the 8" I.D. victaulic pipe. The final depth cased was 13' into the ground and 6' of which the casing had to be worked in through the cuttings.

The proportion of honeycomb and small cavity formations to the final footage drilled is 20.8%. The former being struck at 18'. Water salty.

The theme at this stage was the element of time and also the fact that it was only possible to case down to the rock phosphate at 13' and the exposed alluvial below it may prevent the 8" bit getting much further into the coral; that it was pointless to waste any more time than was necessary for assessing the quality of water.

The hole abandoned and moved to next site at Hole H1.

HOLE NO. H1.

Two consecutive drill attempts in the prepared site were bored each to 6' deep but were abandoned because of the same difficulty met in drilling through alluvial phosphate at H2.

In the meantime while the machine was at H9 and H3C, a new site in the general vicinity was being prepared on a pinnacle found in one of the small pools north of the lagoon. Coral tailings were used to construct a working platform and access to the pinnacle.

SUB HOLES 9A, B and C.

Three drill attempts at 12', 8' and 6' in the general vicinity were tried but abandoned because they were found unsuitable.

H9D.

In the fourth attempt drilled through first 13' of reasonably solid coral. At 13' began loosing air returns until at 18' to 21', a layer of honeycombs was struck and the returns were completely lost.

From 22' to 25' struck possibly a rock phosphate adhering to the coral pinnacle.

At 31' drilling went through a hard layer until at 33' stopped to case the bore. At this stage drilling became risky as the borehole was not cleaning out properly since the loss of air.

The borehole was cased to 33' and drilling resumed. The returns reappeared until a layer of honeycombs was met at 38' 6" to 46' when all returns were lost.

At 56' the drilling rate dropped markedly when boring through a hard layer. A 3' deep cavern was struck at 68' - 71' and drilling was discontinued at 78' for water sampling. The water table was found at 62' which showed a salt counter reading of 4000 ppm. The site engineer requested that a further 10' be drilled to ascertain whether the borehole has in fact gone into salt water. Later test on the water showed a salt content at 600 ppm.

At 78' a layer of honeycombs or small cavities was struck and at 85' met a 6' deep cavern.

From 91' to 95' went through large honeycomb formation. The cavity to solid coral ratio in this borehole is 43.3%. At 95' the bore was abandoned.

SUB HOLE NO. H3B.

Drilling through a reasonably solid coral from 0' to 30'. From 30' to 33' boring through what appeared to be a hard layer of coral when at 33' the 8" ø carset bit was sheared off the hammer at the splined shank.

Machine resited over another pinnacle about 35' away. The loss of the 8" cutter, places a curtailment to all geological boreholes, and it was here then agreed to continue with the pattern holes using the 6½" ∅ cutter.

H3C.

From 0' to 20'6" drilling through reasonably solid coral and at 20'6" to 21'6" a pocket of alluvial phosphate was struck. At 25', 6" cavities; at 35' - 42' 3" layer of small cavities all returns disappearing at 35'. At 56' returns have begun to reappear and at 60' total reappearance was again noticed.

At 69' 6" to 70' a honeycomb formation was encountered and again the air and sample returns were starting to disappear when at 84', a 3' deep cavern was struck and all returns were lost completely. The cavity to solid coral ratio is 22.4%. Boring was taken down to 98' and the drill rods retracted for water sampling. The water table was found at 88' 6" with the salt counter reading at 3500 ppm. The hole was abandoned and machine moved to next site at H1C.

SUB HOLE H1C.

A 9" I.D. Fibrolite pipe 2' 6" long was placed over the pinnacle, (mentioned above, see previous Hole H1), and backfilled with coral tailings.

The first 8' was solid coral and underneath alluvial phosphate. Final depth drilled 25'. Water table was struck in the coral floater after about 18" drilling. The water blown to the surface throughout the full depth drilled was quite substantial and upon tests taken at 2' increments, it was shown that the salt content increases progressively as follows:-

Depth	Parts Per Million
6	1600
10	2700
12	4100
14	5100
16	5400
20	8800
25	9000

It was also noticed that a substantial amount of cuttings was being obtained at the surface with the large flow of water; this was dangerous as the floater was being undermined and any consequential movement may result in the jamming of the tool bit. The water samples collected showed a tinge of greenish discolouring and also the drill rods were discoloured greenish-black. The hole abandoned and machine moved to next site H11.

SUB HOLE NO. 11B.

Hole No. H11A was tried but abandoned as this was only a coral floater. H11B was tried but before any footage was done the pinnacle cracked up. Another H11B was attempted.

H11B.

The cavity to solid coral ratio in this bore is 27.7%. The honeycomb and small cavity formations were more confined to between 44' and 117'. The final depth reached was 123'. A small pocket of alluvial phosphate was struck at 19' to 20', and the return of air and chips were lost at 45'. The water table was struck at 114' in a layer of honeycomb or small cavities and the salt counter reading was 5000 ppm which was just susceptible to taste.

The hole was abandoned at 123'.

HOLES H12 & 13.

Hole No. H12 was drilled to a depth of 20' but abandoned as unsuitable.

Hole No. H13 was drilled to a depth of 18' and the water struck was very salty. Hole abandoned.

CONCLUSION

The Rotary Percussion type of drilling in this coral formation appeared to be unsuitable because the latter was found in all boreholes, to be most inconsistent.

APPENDIX V

WATER SUPPLY REQUIREMENTS FOR NAURU ISLAND

1. The requirement is assessed on the basis that the population is 10,000 and that the population is housed in normal suburban manner with an intensive irrigation area requiring 34 acre feet per month.

No water is provided for flushing, sewerage etc., which would be done with salt water.

2. The estimated rate of demand is 70 gallons per head per day based on the appended analysis. The consumption per month is taken at 77 acre feet.

3. The losses by evaporation and leakage taken at 6 feet per annum or 6 inches per month, and are assessed for a surface storage system of supply at 33 acre feet per month, and 3 acre per month otherwise.

4. If irrigation is used, an allowance of 34 acre feet per month is proposed. Irrigation would require surface storage.

5. The monthly rates of demand would be either:-

80 acre feet per month
110 " " " "
144 " " " "

6. The monthly rainfall records for the periods 1916-1941 and from 1946 to 1965 are available in monthly totals. (See Appendix II). Mass diagrams have been constructed from these figures, and are compared with the rates of demand above, on the basis that the area of 100% run off on the island is either 180 acres or 400 acres depending on the nature of storage used. In the case of 180 acres, it is assumed that some water is delivered to the island by ship, as detailed later.

7. From the mass diagrams the required maximum storage appears to be:-

For 80 acre feet per month on limited catchment.	1080 acre feet
110 acre feet on limited catchment	1600 " "
144 acre feet on limited catchment	2400 " "

8. The storage possibilities are:-

(a)	From the roofs of domestic buildings 2500 x 600 gallons	55 ac. ft.
(b)	From public buildings etc. and fixed storage tanks	50 ac. ft.
(c)	Storage reservoir constructed on worked out lands RL.80	1600 ac. ft.
(d)	ditto RL.70	1200 ac. ft.
(e)	ditto RL.80 - no excavation	800 ac. ft.
(f)	New service reservoirs of 20×10^6 gallon capacity	80 ac. ft.

A combination of (a), (b) and (f) would provide for a demand of 24 acre ft. per month.

A combination of (a) (b) (c) would provide for a demand of 130 ac. ft./ month.

A combination of (a) (b) (e) and (f) 70 ac. ft. per month.

A combination of (a) (b) and (d) would provide for a demand of 100 ac. ft. per month.

It does appear that a supply can be maintained for urban purposes, but irrigation is doubtful during one year in five.

9. The basic requirements for the water supply system are:-

(i)	Storage tanks on houses	2500 @ $1000	$2,500,000
(ii)	Storage tanks on public buildings and service reservoir		$ 200,000
(iii)	Surface storage on uplands	1600 ac. ft.	$9,800,000
		1200 ac. ft.	$7,350,000
(iv)	Service reservoirs as alternative to surface storage (10 @ 2×10^6 gallon)		$ 700,000
(v)	Ring Main around the island, with submains to serve Buada Lagoon and areas such as Administration and local communities		$2,000,000
(vi)	Booster pump stations		$ 50,000
(vii)	Service connections to tenements, etc. including meters		$1,000,000

(viii)	For surface storage; galleries for collection of water including gallery from aerodrome site to storage equivalent to 170 acres	$1,700,000
(ix)	Chlorination and fluoridation plant	$ 10,000

The estimated costs are indicated for each item, and a full allowance has been made for the items existing on the island in 1966 which would still be of service in 1996.

10. A possible combination of service reservoir storage with roof conservation and a surface storage within natural contours has been examined. The surface yield from the proposed airport, with the delivery of water regularly from Brisbane by regular shipping service has been taken into account. (See Appendix VI).

The total estimated cost of such a water supply with the aerodrome can be compared with other arrangements.

Estimate

Portion of cost of shipping facility	$ 250,000
Items (i), (ii), (iv), (v), (vi), (vii), (ix) in paragraph 9	$6,460,000
Capitalized cost of providing annual import of water of 300,000 tons	$4,600,000
Cost of airport assuming no material available from water reservoir construction	$10,000,000
	$21,310,000
Add for unexcavated surface storage to increase yield	$ 2,800,000
The monthly capacity is 24 ac. ft. for the smaller estimate and 70 ac. ft. for the higher.	$24,110,000
	-

11. The comparative estimated cost for a local storage reservoir fed by run-off from the surface, including the airport, using a system of galleries for collection is:

Assume storage capacity 1600 ac. ft.

Items (i), (ii), (iii), (v), (vi), (vii), (viii), (ix) in paragraph 9	$17,260,000
Airport	$ 8,000,000
	$25,260,000

Assume capacity 1200 ac. ft.

	$14,810,000
Airport	$ 8,500,000
	$22,310,000

The respective rates of supply are 130 ac. ft. and 80 ac. ft. per month.

With the larger storage, irrigation would be available on the average of four years out of five, but when drought conditions occurred (i.e. when the rainfall in 12 months was less than 24"), irrigation would have to be reduced.

12. The land required for a water supply with surface storage is 70 acres.

13. At the estimates indicate, there is an overwhelmingly advantageous situation if a surface storage of at least 1600 ac. ft. is adopted.

Daily Rate of Water consumption

		N	R
1.	Drinking and Cooking	5	5
2.	Washing (personal)	8	5
3.	" (domestic)	15	5
4.	Animal requirements	6	6
5.	Gardening	20	-
6.	Public purposes, including hospitals, schools and small industry	10	10
	Gallons per person per day	70	35

N Normal times

R Restricted periods (after twelve months during which total rainfall does not exceed 20").

APPENDIX VI

STUDY OF PROPOSAL TO SUPPLY WATER TO THE ISLAND OF NAURU BY SHIP DESIGNED FOR THE SPECIAL PURPOSE.

1. On the cessation of the phosphate extraction at Nauru, the Nauruan community of some 10,000 will require a regular shipping service for the import of foodstuffs, building materials, fuels and oil and general requirements including minor passenger needs.

2. It is proposed to examine the use of a special vessel capable of performing the above duties and otherwise delivering 300,000 tons per annum of water.

3. Assume that a vessel of special design is used, which has a dead weight capacity of 10,000 tons, a speed of 17 knots, and operates between Brisbane and Nauru.

4. The round voyage would be some nine days, and at least 35 voyages a year should be possible. Thus some 350,000 tons dead weight would be delivered of which 300,000 tons would be water and the balance general cargoes, though incoming cargo probably would not exceed 20,000 tons.

5. The annual cost of operating such a ship, including depreciation, is estimated at $700,000, the capital cost being $3,500,000 including shore facilities.

6. If cargo is charged at rate of $20 per ton the income would be:

20,000 x 20 = $400,000

leaving as cost for water freight $300,000, or $1 per ton, or $4.45 per 1,000 gallons for freight. The total cost of 68,000,000 gallons, including purchase at 20 cents would be $4.80 per 1,000 gallons - or $326,400 which is equivalent to the annual capital and interest charges on $4,600,000.

APPENDIX VII

BIBLIOGRAPHY

This appendix lists the various reference material which provided much background and other information to the Committee.

Department of Territories, Canberra	Annual Report of the Administration of the Territory of Nauru 1963-1964.
T.C. Tyrer	"Nauru and Ocean Islands Story". (Wellington, 1965)
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Dr. Paul Hambruch	"Nauru" (Ergebnisse der Sudsee - Expedition 1908-1910).
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C.S.I.R.O. (E. Phillis and H. A. Haantjens)	Report on Present and Potential Land Use on Nauru Island 1954.
United Nations Trusteeship Council	Report on Nauru by the United Nations Visiting Mission to the Trust Territory of Nauru 1965.
Nancy E. Kirk	Dietary Survey of the U.N. Trust Territory of Nauru, 1957.
Dr. Helen Hughes	The Political Economy of Nauru (Australian National University, 1964).

Annex 26

NAURU ISLAND AGREEMENT, 2 JULY 1919

AGREEMENT BETWEEN HIS MAJESTY'S GOVERNMENT IN LONDON, HIS MAJESTY'S GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA, AND HIS MAJESTY'S GOVERNMENT OF THE DOMINION OF NEW ZEALAND.

Whereas a Mandate for the administration of the Island of Nauru has been conferred by the Allied and Associated Powers upon the British Empire and such Mandate will come into operation on the coming into force of the Treaty of Peace with Germany, and

Whereas it is necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island.

Now, therefore, His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia, and His Majesty's Government of the Dominion of New Zealand do hereby agree as follows:—

Article 1.

The Administration of the Island shall be vested in an Administrator.

The first Administrator shall be appointed for a term of five years by the Australian Government; and thereafter the Administrator shall be appointed in such manner as the three Governments decide.

The Administrator shall have power to make ordinances for the peace, order and good government of the Island, subject to the terms of this Agreement, and particularly (but so as not to limit the generality of the foregoing provisions of this Article) to provide for the education of children on the Island, to establish and maintain the necessary police force, and to establish and appoint courts and magistrates with civil and criminal jurisdiction.

Article 2.

All the expenses of the administration (including the remuneration of the Administrator and of the Commissioners), so far as they are not met by other revenue, shall be defrayed out of the proceeds of the sales of the phosphates.

Article 3.

There shall be a Board of Commissioners, comprising three members, one to be appointed by each of the Governments who are parties to this agreement.

Article 4.

Each of the Commissioners shall hold office during the pleasure of the Government by which he is appointed.

Article 5.

The three Governments, or if they are unable to agree a majority of them, shall fix the remuneration of the Commissioners.

Article 6.

The title to the phosphate deposits on the Island of Nauru and to all land, buildings, plant, and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners.

Article 7.

Any right, title or interest which the Pacific Phosphate Company or any person may have in the said deposits, land, buildings, plant and equipment (so far as such right, title and interest is not dealt with by the Treaty of Peace) shall be converted into a claim for compensation at a fair valuation.

Article 8.

The amount of the said compensation shall be contributed by the Governments of the United Kingdom, the Commonwealth of Australia, and the Dominion of New Zealand in proportions to be mutually agreed upon, or in the event of their failing to agree within three months of this agreement coming into force, then in the same proportions as the first allotment of phosphates under Article 14 of this agreement. Any other capital necessary for working expenses shall be contributed by the three Governments in the same proportions.

Article 9.

The deposits shall be worked and sold under the direction, management, and control of the Commissioners subject to the terms of this Agreement.

It shall be the duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend.

ARTICLE 10.

The Commissioners shall not, except with the unanimous consent of the three Commissioners, sell or supply any phosphates to, or for shipment to, any country or place other than the United Kingdom, Australia or New Zealand.

ARTICLE 11.

Phosphates shall be supplied to the United Kingdom, Australia and New Zealand at the same f.o.b. price, to be fixed by the Commissioners on a basis which will cover working expenses, cost of management, contribution to Administrative expenses, interest on capital, a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges.

Any phosphates not required by the three Governments may be sold by the Commissioners at the best price obtainable.

ARTICLE 12.

All expenses, costs, and charges shall be debited against receipts; and if by reason of sales to countries other than the United Kingdom, Australia or New Zealand, or by other means or circumstances, any surplus funds are accumulated, they shall be credited by the Commissioners to the three Governments in the proportion in which the three Governments have contributed under Article 8 of this Agreement and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct, or if so directed by the Government for which they are held shall be paid over to that Government.

ARTICLE 13.

There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement.

ARTICLE 14.

Until the readjustment hereinafter mentioned, each of the three Governments shall be entitled to an allotment of the following proportions of the phosphates produced or estimated to be produced in each year, namely:—

United Kingdom	42%
Australia	42%
New Zealand	16%

Provided that such allotment shall be for home consumption for agricultural purposes in the country of allotment, and not for export.

At the expiration of the period of five years from the coming into force of this agreement, and every five years thereafter, the basis of allotment shall be readjusted in accordance with the actual requirements of each country.

If in any year any of the three Governments does not require any portion of its allotment, the other Governments shall be entitled, so far as their requirements for home consumption extend, to have that portion allotted among themselves in the proportions of the percentages to which they are entitled as above.

Where any proportion of the allotment of one of the Governments is not taken up by that Government, that Government shall, when the phosphates are sold, be credited with the amount of the cost price as fixed by the Commissioners under the first paragraph of Article 11; but if such phosphates are sold to a purchaser other than one of the Governments any profit above the said cost price shall be carried to the surplus fund mentioned in Article 12.

ARTICLE 15.

The agreement shall come into force on its ratification by the Parliaments of the three countries.

Dated this second day of July in the year of Our Lord one thousand nine hundred and nineteen.

Signed by the Right Honourable David Lloyd George for and on behalf of His Majesty's Government in London, in the presence of— ERNEST EVANS.	(Sgd.) D. LLOYD GEORGE.
Signed by the Right Honourable William Morris Hughes for and on behalf of the Government of the Commonwealth of Australia, in the presence of— R. R. GARRAN.	(Sgd.) W. M. HUGHES.
Signed by the Right Honourable William Ferguson Massey for and on behalf of the Government of the Dominion of New Zealand, in the presence of— R. R. GARRAN.	(Sgd.) W. F. MASSEY.

Annex 28

SUPPLEMENTARY AGREEMENT CONCERNING NAURU, 30 MAY 1923

SUPPLEMENTARY AGREEMENT CONCERNING NAURU DATED 30TH MAY, 1923.

AGREEMENT between His Majesty's Government in London His Majesty's Government of the Commonwealth of Australia and His Majesty's Government of the Dominion of New Zealand.

Whereas a Mandate for the administration of the Island of Nauru has been conferred upon His Majesty:

And whereas by an Agreement dated the second day of July, 1919, between His Majesty's Government in London the Government of the Commonwealth of Australia and the Government of the Dominion of New Zealand (hereinafter called the "Contracting Governments") it is among other things provided that—

ARTICLE I.

"The administration of the Island shall be vested in an Administrator.

"The first Administrator shall be apointed for a term of five years by the Australian Government and thereafter the Administrator shall be appointed in such a manner as the three Governments decide.

"The Administrator shall have power to make Ordinances for the peace order and good government of the Island subject to the terms of this Agreement and particularly (but so as not to limit the generality of the foregoing provisions of this Article) to provide for the education of children on the island to establish and maintain the necessary police force and to establish and appoint courts and magistrates with civil and criminal jurisdiction."

And whereas the Government of the Commonwealth of Australia have appointed Brigadier-General Thomas Griffiths, C.M.G., C.B.E., D.S.O., to be the first Administrator:

And whereas it is expedient to make further provision for the good government of the Island under the terms of the Mandate and of the Treaty of Peace with Germany subject to the terms of the Agreement aforesaid.

It is hereby further agreed between the three Governments as follows:—

1. All Ordinances made by the Administrator shall be subject to confirmation or disallowance in the name of His Majesty, whose pleasure in respect of such confirmation or disallowance shall be signified by one of His Majesty's Principal Secretaries of State, or by the Governor-General of the Commonwealth of Australia acting on the advice of the Federal Executive Council of the Commonwealth, or by the Governor-General of the Dominion of New Zealand acting on the advice of the Executive Council of the Dominion, according as the Administrator shall have been appointed by His Majesty's Government in London, or by the Government of the Commonwealth of Australia, or by the Government of the Dominion of New Zealand, as the case may be.

2. The Administrator shall conform to such instructions as he shall from time to time receive from the Contracting Government by which he has been appointed.

3. Copies of all ordinances, proclamations and regulations made by the Administrator shall be forwarded by him to the Contracting Government by which he has been appointed, for confirmation or disallowance, and to the two other Contracting Governments for their information; and the Administrator shall supply through the Contracting Government by which he has been appointed such other information regarding the administration of the Island as either of the other Contracting Governments shall require.

4. All such reports as are required to be rendered to the Council of the League of Nations in virtue of Article 22 of the aforesaid Treaty of Peace or otherwise shall be transmitted by the Administrator through the Contracting Government by which he has been appointed to His Majesty's Government in London for presentation to the Council on behalf of the British Empire as Mandatory.

Dated this 30th day of May in the year of Our Lord One thousand nine hundred and twenty-three.

Signed by His Grace the Duke of Devonshire for and on behalf of His Majesty's Government in London, in the presence of—
W. C. HANKINSON. } DEVONSHIRE.

Signed by the Right Honourable Sir Joseph Cook for and on behalf of the Government of the Commonwealth of Australia, in the presence of
O. C. W. FUHRMAN. } JOSEPH COOK.

Signed by Colonel the Honourable Sir James Allen for and on behalf of the Government of the Dominion of New Zealand, in the presence of
C. KNOWLES. } JAMES ALLEN.

Annex 30

AGREEMENT BETWEEN THE THREE PARTNER GOVERNMENTS RELATING TO NAURU, CANBERRA, 26 NOVEMBER 1965

AUSTRALIA

TREATY SERIES 1965
No. 20

AGREEMENT

(Canberra, 26th November, 1965)

BETWEEN

AUSTRALIA, NEW ZEALAND, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

RELATING TO

NAURU

Entry into force: 26th November, 1965

DEPARTMENT OF EXTERNAL AFFAIRS,
CANBERRA, A.C.T.

By Authority:
A. J. ARTHUR, Commonwealth Government Printer, Canberra
(Printed in Australia)

15574/65.—PRICE 1s. 6d. (15c)

AGREEMENT BETWEEN THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA, THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND RELATING TO THE TERRITORY OF NAURU

WHEREAS the Government of the Commonwealth of Australia, the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland have, conformably with the Trusteeship Agreement* for the Territory of Nauru and after consultation with the Nauruan people, agreed that further provision should be made for the Government of the Territory and in particular that there should be established a Legislative Council and an Executive Council in order to enable the Nauruan people to participate more fully in the government of the Territory and for this purpose have agreed to modify the existing Agreements between the three Governments:

AND WHEREAS the three Governments have agreed that the modifications so made should have effect until, conformably with the Trusteeship Agreement and after consultation with the Nauruan people, the three Governments otherwise agree:

NOW THEREFORE IT IS AGREED by the Government of the Commonwealth of Australia, the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland as follows:—

Article 1

(1.) A Legislative Council, a majority of the members of which are to be elected by the Nauruan people, is to be established as from the appointed day.

(2.) Without affecting the powers of the Commonwealth Parliament to make laws for the government of the Territory—

- (a) the Legislative Council is to have power to make Ordinances for the peace, order and good government of the Territory except Ordinances with respect to—
  - (i) defence,
  - (ii) external affairs,
  - (iii) the phosphate industry (including the operation, ownership and control of that industry);
  - (iv) phosphate royalties; and
  - (v) the ownership and control of phosphate-bearing land; and
- (b) the Governor-General is to have power as from the appointed day to make Ordinances for the peace, order and good government of the Territory with respect to—
  - (i) defence, internal security and the maintenance of peace and order;
  - (ii) external affairs;
  - (iii) the phosphate industry (including the operation, ownership and control of that industry);

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* United Kingdom Treaty Series No. 89 of 1947 (Cmd. 7290); British and Foreign State Papers, Volume 148, page 820. United Nations Treaty Series, Volume 10, page 3.

(iv) phosphate royalties; and
(v) the ownership and control of phosphate-bearing land.

(3.) Ordinances made by the Legislative Council are not to have the force of law until assented to by the Administrator, or, if reserved by the Administrator for the Governor-General's consideration, by the Governor-General. The Administrator is to have a general discretion to reserve Ordinances for the Governor-General's consideration. The Administrator is, if required by an Act of the Commonwealth Parliament to do so in specified cases, to reserve Ordinances for the Governor-General's consideration.

(4.) The Governor-General is to have power to disallow an Ordinance that has been assented to by the Administrator.

(5.) Ordinances made by the Governor-General are to be subject to disallowance by either House of the Commonwealth Parliament as provided by Act of that Parliament.

(6.) The application of its own force, in or in relation to the Territory, of an Act of the Commonwealth Parliament, or of a regulation under such an Act, is not to be affected by an Ordinance.

Article 2

(1.) An Executive Council is to be established, consisting of—

(a) the Administrator; and
(b) members appointed by the Governor-General.

(2.) The members appointed by the Governor-General are to include persons appointed from amongst the members of the Legislative Council elected by the Nauruan people. A person is not to be appointed as a member of the Executive Council from amongst the members of the Legislative Council elected by the Nauruan people unless he has been nominated for the purpose by a majority of those members of the Legislative Council.

(3.) The Executive Council is to have such powers and functions as are conferred on it by law, including the function of tendering advice on any matter referred to it by the Administrator for advice.

Article 3

Subject to the provisions of this Agreement, the administration of the Territory is, on and after the appointed day, to be vested in an Administrator appointed by the Government of the Commonwealth of Australia.

Article 4

Upon the expiration of the day last preceding the appointed day, the Administrator is to cease to have power to make Ordinances for the peace, order and good government of the Territory, but all Ordinances made before the appointed day and not repealed before that day are, subject to laws made on or after the appointed day, to continue in force in the Territory.

Article 5

(1.) A Central Court and a Court of Appeal for the Territory are to be established to replace the existing Central Court and Court of Appeal.

(2.) The Central Court and the Court of Appeal are to be constituted as provided by, and are to have such jurisdiction as is conferred by or under, Act of the Commonwealth Parliament.

(3.) Subject to any Act of the Commonwealth Parliament and to any Ordinance, the District Court exercising jurisdiction in or in relation to the Territory is to continue in existence with the same jurisdiction as it now has.

(4.) An appeal is to lie from a judgment of the Court of Appeal to the High Court of Australia by leave of the High Court.

Article 6

The Government of the Commonwealth of Australia will submit to the Commonwealth Parliament legislation to give effect to this Agreement and to make such other provisions in relation to the government of the Territory as the Government of the Commonwealth of Australia deems necessary or convenient.

Article 7

At the commencement of the appointed day, Article 1 of the Agreement concerning Nauru dated the second day of July, 1919* between His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia and His Majesty's Government of the Dominion of New Zealand and the whole of the supplementary Agreement concerning Nauru dated the thirtieth day of May, 1923** between those Governments will cease to have effect.

Article 8

For the purposes of this Agreement—

'Administrator' includes a person appointed by the Government of the Commonwealth of Australia to act as Administrator during any illness or absence of the Administrator;

'the appointed day' means the day fixed by the Governor-General by Proclamation published in the Commonwealth of Australia Gazette as the appointed day for the purposes of this Agreement;

'the Commonwealth Parliament' means the Parliament of the Commonwealth of Australia;

'the Governor-General' means the Governor-General of the Commonwealth of Australia, or a person administering the Government of the Commonwealth of Australia, acting, in either case, with the advice of the Federal Executive Council, and includes any person for the time being appointed by the Governor-General or by the person administering the Government of the Commonwealth of Australia to be a deputy of the Governor-General or of that person, as the case may be, so acting;

'The Territory' means the Territory of Nauru.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

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* Commonwealth Act No. 8 of 1919; British and Foreign State Papers, Volume 113, page [illegible].

** Commonwealth Act No. 54 of 1932; British and Foreign State Papers, Volume 135, page 248.

DONE at Canberra this twenty-sixth day of November, One thousand nine hundred and sixty-five in one original which shall be deposited in the archives of the Commonwealth of Australia. Certified copies of this Agreement shall be transmitted by the Government of the Commonwealth of Australia to the other two signatory Governments.

For the Government of the
Commonwealth of Australia:

C. E. BARNES

For the Government of New Zealand:

J. LUKE HAZLETT

For the Government of the United
Kingdom of Great Britain and
Northern Ireland:

C. H. JOHNSTON

Annex 31

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA, THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO TERMINATE THE NAURU ISLAND AGREEMENT 1919, 9 FEBRUARY 1987

AUSTRALIA

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA, A.C.T.

Agreement

between the

Government of Australia,

the

Government of New Zealand

and the

Government of the United Kingdom of Great Britain and Northern Ireland

to Terminate the Nauru Island Agreement 1919

(Canberra, 9 February 1987)

Entry into force: 9 February 1987

TREATY SERIES 1987
No. 8

AGREEMENT
BETWEEN THE GOVERNMENT OF AUSTRALIA, THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO TERMINATE THE NAURU ISLAND AGREEMENT 1919

The Government of New Zealand, the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the Partner Governments"),

Recalling that the Agreement between the Partner Governments concerning, inter alia, the mining of the phosphate deposits of the island of Nauru, done on 2 July 1919,[1] as amended by the Agreements between the Partner Governments done on 30 May 1923[2] and 26 November 1965,[3] (hereinafter referred to as "the Nauru Island Agreement") established a Board of Commissioners (the present members of whom are hereinafter referred to as "the Commissioners") comprising three members, one to be appointed by each of the Partner Governments;

Recalling that the Agreement between the Government of Australia and the Government of New Zealand relating to Christmas Island, done on 30 September

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[1] Commonwealth Act No. 8 of 1919; S.P. 113 p. 151

[2] Commonwealth Act No. 54 of 1932; S.P. 135 p. 248

[3] Aust. T.S. 1965 NO. 20; Commonwealth Act No. 115 of 1965; U.K.T.S. No. 96 of 1965; Cmnd. 2844; U.N.T.S. 598 p. 81

1958,[4] as amended by the Agreements between the Government of New Zealand and the Government of Australia done on 21 November 1958[5] and 8 September 1976[6] (hereinafter referred to as "the Christmas Island Agreement 1958") provided that the Christmas Island Phosphate Commission shall, in the exercise of its responsibility to manage and control the mining of phosphate on Christmas Island, employ the Commissioners as managing agents;

Recognising that pursuant to Article 1 of the Agreement between the Government of New Zealand and the Government of Australia to amend the Christmas Island Agreement 1958, done at Canberra on 9 June 1981,[7] the functions of the Comissioners as managing agents for the Christmas Island Phosphate Commission have ceased;

Desiring that, since the purposes for which the Commissioners were appointed have come to an end, the Commissioners should proceed to wind up their affairs and distribute their residual assets and liabilities to the Partner Governments;

Have agreed as follows:

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[4] Aust. T.S. 1958 No. 23; U.N.T.S. 340 p. 61; Commonwealth Act No. 69 of 1958

[5] Aust. T.S. 1958 No. 23; U.N.T.S. 340 p. 76

[6] Aust. T.S. 1976 No. 19

[7] Aust. T.S. 1981 No. 29

ARTICLE 1

(1) Within 60 days of the entry into force of this Agreement the Commissioners shall:

(a) convert into cash those of their assets that do not consist of cash or cash at banks;

(b) make payments in respect of those known liabilities of the Commissioners that may be paid conveniently; and

(c) when they are reasonably satisfied that:

(i) they have made the payments referred to in sub-paragraph (b); and

(ii) all known assets and liabilities of the Commissioners can be accounted for in their final accounts,

distribute the net surplus of their assets less the sum of A$500,000 to the Partner Governments in the following proportions:

United Kingdom	:	31.5 percent;
Australia	:	47.5 percent;
New Zealand	:	21.0 percent.

(2) The sum of A$500,000 referred to in paragraph (1) of this Article shall be applied in payment of those liabilities of the Commissioners that may only be paid conveniently after the distribution referred to in paragraph (1) of this Article, and before the distribution referred to in paragraph (3) of this Article.

(3) Within 150 days of the entry into force of this Agreement, the Commissioners shall:

(a) prepare and present to the Partner Governments their final accounts, duly audited; and

(b) distribute the balance of their assets to the Partner Governments in the proportions referred to in paragraph (1) of this Article.

(4) Should there arise or come to hand following the distribution referred to in paragraph (3) of this Article any assets which, had the Commissioners remained in office and the distribution not been made to Partner Governments, would have been assets to which the Commissioners would have been entitled, then each of the Partner Governments shall promptly provide the others with particulars of every such asset arising or coming to hand, and as regards any such assets the Partner Governments shall be entitled to the same, in the same proportions set out in paragraph (1) of this Article.

ARTICLE 2

Each of the Partner Governments shall indemnify the Commissioner appointed by that Government who holds office immediately before the entry into force of this Agreement in respect of liabilities incurred in the course of his duties as a Commissioner.

ARTICLE 3

(1) This Article shall apply to claims unsatisfied upon the distribution of assets in accordance with paragraph (3) of Article 1 which are claims:

(a) against one or more Commissioners or former Commissioners as such; or

(b) against a Partner Government arising out of the actions of the Commissioners or former Commissioners as such.

(2) In the event of a claim, the Partner Government against whom, or against whose Commissioner or former Commissioner, that claim is brought shall inform the other Partner Governments of that claim prior to the commencement of proceedings or, where time limits for litigation render this impossible, as soon as possible thereafter. The Partner Governments shall consult at the request of any Partner Government on the conduct of the legal proceedings arising out of the claim, and on the manner in which the claim may be settled.

(3) If in relation to a claim which does not arise out of the fraudulent or criminal acts of one or more of the Commissioners or former Commissioners:

(a) the Partner Governments mutually decide that payment should be made in settlement of the claim; or

(b) a Partner Government is obliged to make a payment following an order of a Court of competent jurisdiction adjudicating upon the claim, the Partner Governments shall contribute to that payment in the proportions referred to in paragraph (1) of Article 1.

(4) The Partner Governments shall contribute in the proportions referred to in paragraph (1) of Article 1 to the costs incurred by a Partner Government in defending a claim other than a claim which arises out of the fraudulent or criminal acts of one or more of the Commissioners or former Commissioners as such.

(5) Notwithstanding the proportionate assumption by the Partner Governments of responsibility for claims provided for in paragraphs (3) and (4) of this Article, if any such claim arises out of any act or omission by the Commissioners or former Commissioners while acting as managing agents for the Christmas Island Phosphate Commission, in respect whereof the Commissioners or former Commissioners would have been entitled under the laws of the State of Victoria in Australia to reimbursement or recovery from the Christmas Island Phosphate Commission as principal, then the Government of Australia and the Government of New Zealand shall consult with a view to ascertaining the best method of assessing the claim and determining the appropriateness of the settlement.

ARTICLE 4

After the distribution to the Partner Governments provided for by paragraph (3) of Article 1 the Partner Governments may, and shall on request of the Commissioners, formally by written notice terminate the office of the Commissioners.

ARTICLE 5

(1) This Agreement shall enter into force upon signature.

(2) Insofar as it is still in force, the Nauru Island Agreement shall be terminated on the date upon which the presentation to each Partner Government of final accounts provided for in Article 1 has been completed as recorded in an exchange of notes through the diplomatic channel at Canberra between the Partner Governments.

In witness whereof the undersigned, duly authorised thereto, have signed this Agreement.

Done at Canberra this ninth day of February 1987 in three originals.

[signed] G. SCHOLES
For the Government of Australia:

[signed] J.G. ANSELL
For the Government of New Zealand:

[signed] JOHN LEAHY
For the Government of the United Kingdom of Great Britain and Northern Ireland:

Annex 34

LANDS ORDINANCE 1921 (NAU)

LANDS ORDINANCE 1921.

[*Ordinance No. 12.*]

1. I, Thomas Griffiths, Administrator of the Island of Nauru, by virtue of the powers me thereunto enabling, do hereby enact, order, and proclaim as follows :—

2. This Ordinance may be cited for all purposes as the *Lands Ordinance* 1921, and shall come into operation forthwith.

3. In this Ordinance "The Administrator" shall mean the person for the time being administering the Government of the Island of Nauru.

4. (1.) Any person, firm, or company who, without the consent in writing of the Administrator, or a person duly authorised by the Administrator to give such consent, transfers, sells, or leases, or enters into any contract or agreement for the sale, or lease of, or for the granting of any estate or interest in any land, shall be guilty of an offence and shall be liable to a penalty not exceeding £10 (Ten pounds), or in default, imprisonment for a period not exceeding two months.

(2.) Any transfer, sale, lease, contract, or agreement made or entered into, in contravention of this section, shall be absolutely void and of no effect.

5. Subject to the approval of the Administrator, land may be leased for such periods as the Administrator may approve, subject to the following conditions :—

(*a*) *Phosphate-bearing lands* may be leased to the British Phosphate Commission for a period terminating not later than the 31st March, in the year 2000, subject to—

(1) Payment to the owner when lease is entered into, at the rate of Twenty pounds per acre, or proportional rate thereof, if less than one acre ;
and

(2) Payment of royalty on all phosphate actually shipped in accordance with Bill of Lading figures at the rate of Threepence per ton, of which Twopence shall be paid to the owner, and One penny to the Administrator, to be held in trust for the benefit of the natives of Nauru.

These payments shall be made twice yearly—the first payment to be in January, for all phosphates shipped from 1st July to 31st December preceding. The second payment to be in July, for all phosphates shipped from 1st January to 30th June preceding.

The trees and shrubs on land acquired under this sub-section shall be the property of the British Phosphate Commission, to be disposed of as the British Phosphate Commission may deem fit.

The Administrator shall determine what lands shall be classed as phosphate-bearing lands, for the purpose of this sub-section.

(*b*) *Non-phosphate-bearing lands* may be leased by any person, subject to the approval of the owner and the Administrator, for a period terminating not later than the 31st day of March, in the year 2000, subject to—

(1) Payment of an annual rental at rate of 25s. per acre or proportion thereof, if less than 1 acre.

(2) The trees and edible fruits thereof on land leased under this sub-section shall remain the property of the lessor, who shall at all times between the hours of sunrise and sunset have the right to enter on such land, and remove the fruits of such trees.

(3) The lessor shall not plant any trees on the leased land without the consent of the lessee, except to replace trees that may die from natural causes.

(4) No trees shall be removed, destroyed, or damaged by the lessee or his agents unless the consent of the Administrator is first obtained ; and the Administrator shall assess the amount of compensation for such removal, destruction, or damage to be awarded to lessor in each case, in accordance with the following schedule :—

		Per Tree.
		£ s. d.
Coconut trees, full grown		1 0 0
" " three-quarter grown		0 15 0
" " half grown		0 10 0
" " smaller	from 5s. to	0 10 0
Pandanus trees, full grown	from	0 8 0
" " three-quarter grown	from	0 6 0
" " half grown	from	0 4 0
" " smaller	from 6d. to	0 1 0
Tamanu trees (according to size)	from 1s. to	0 5 0
Almond trees (according to size)	from 1s. to	0 4 0

Penalty : Fine not exceeding £5.

6. Notwithstanding the foregoing, the Administrator shall have the power to fix special rates for leasing of non-phosphate-bearing lands in exceptional cases where he considers the rates specified in sub-section (*b*) of 5 are not equitable.

Given under my hand this 24th day of October, 1921.

T. GRIFFITHS,
Administrator.

Annex 36

LANDS ORDINANCE AMENDMENT ORDINANCE 1927 (NAU)

ADMINISTRATION OF NAURU

Ordinance No. 7 of 1927

AN ORDINANCE TO AMEND THE LANDS ORDINANCE 1921

I, WILLIAM AUGUSTIN NEWMAN, Administrator of the Island of Nauru, by virtue of the powers me thereunto enabling, do hereby enact, order, and proclaim as follows:-

This Ordinance may be cited as the "Lands Ordinance Amendment Ordinance 1927" and shall come into operation forthwith.

The Lands Ordinance 1921, is, in this Ordinance, referred to as the Principal Ordinance.

The principal Ordinance as amended by this Ordinance may be cited as the Lands Ordinance 1921-1927.

Sections 4 and 5. of the Principal Ordinance are cancelled and the following sections are substituted therefor:

4. PHOSPHATE-BEARING LANDS

Phosphate-bearing lands may be leased to the British Phosphate Commissioners (hereinafter called the Commissioners) subject to the following conditions:-

(a) The Commissioners to have the right -

(1) to lease any phosphate-bearing land on the island of Nauru, to mine the phosphate thereon to any depth desired, and to use or export such phosphate.

(2) to remove any threes on any phosphate-bearing land leased for mining purposes.

(3) to remove, subject to the approval of the Administrator and the owner, which approval shall not be unreasonaby withheld any trees on any other phosphate-bearing land required by the commissioners to be cleared for use in connection with the operations of the Commissioners.

(4) of way over any unworked, partly worked or worked out phsphate-bearing land required by the Commissioners for or in connection with the operations of the Commissioners, subject to the approval of the administrator and owner, which approval shall not be unreasonably withheld.

The Administrator shall determine what lands shall be classed as phosphate-bearing lands for the purposes of (1) (2), (3) and (4) of this sub-section.

(b) The Commissioners shall pay -

(i) a lump sum at the rate of £40 per acre (with a minimum payment of £5 for any such smaller area) for any phosphate-bearing land leased.

(ii) a royalty of 7½d per ton of phosphate exported according to the certified weight of the quantity shipped of which

4d. per ton shall be paid to the Nauruan Landowner(s) concerned.

1½d.per ton shall be paid to the Administrator tobe used solely for the benefit of the Nauruan people.

2d.per ton shall be paid to the Administrator tobe held in trust for the landowner(s) and invested for a period of 20 years at compound interest. At the end of 20 years the then capital to remain invested and the interest to be paid each half year to the person on whose behalf it was invested or if deceased, to his (or her) children or to whomsoever he (or she) may have willed it.

The rates specified in (1) and (ii) of this sub-section, shall have effect for a period not exceeding 20 years on and from the 1st day of July 1927, but the royalty of 4d. per ton to the Nauruan Landowner(s) shall be adjusted for the second, third and fourth five yearly periods of this agreement by increasing or decreasing it pro rata to any increase or decrease of the f.o.b. price of Nauru Phosphate sold by the Commissioners to the United Kingdom, Australia and New Zealand for the 6th,11th and 16th years of this agreement compared with such price for the first year of this agreement, viz, at the rate of ½d.per ton increase or decrease of royalty for every 1/- per ton increase or decrease of the price.

(c) As soon as practicable all worked outland not required for or in connection with the operations of the Commissioners shall revert to the owner(s) concerned.

5.

NON-PHOSPHATE BEARING LANDS

The Commissioners may, subject to the approval of the Administrator and the owner(s), which approval shall not be unreasonably withheld, lease such non-phosphate bearing lands on the island of Nauru as may be required by the Commissioners for or in connection with the operations of the Commissioners, and to remove any trees from the land so leased, subject to the following conditions:-

(a) The Commissioners shall pay -

(1) a rental at the rate of £3. per acre per annum with a minimum rental of £1 per annum for any such smaller area) for any non-phosphate bearing land leased according to the foregoing,

and

(2) compensation in respect of trees removed, in accordance with the following schedule :-

Coconut trees	each	2/6 to 25/-	according to growth
Pandanus	"	2/- to 16/-	"
Tomano	"	2/- to 20/-	"
Almond	"	2/- to 10/-	"

The rates specified in (1) and (2) of this sub-section, shall have effect for a period not exceeding 20 years on and from the 1st day of July,1927.

Annex 38

LANDS ORDINANCE 1939 (NAU)

THE ISLAND OF NAURU

No. 11 of 1939.

AN ORDINANCE TO AMEND THE LANDS ORDINANCE 1921-1927.

BE it ordained by the Administrator of the Island of Nauru, acting in pursuance of the powers conferred by Article 1 of the Agreement dated the second day of July, 1919, between His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia and His Majesty's Government of the Dominion of New Zealand, as follows :—

Short Title and Citation

1.—(1.) This Ordinance may be cited as the *Lands Ordinance* 1939

(2.) The *Lands Ordinance* 1921-1927 is in this Ordinance referred to as the Principal Ordinance.

(3.) The Principal Ordinance, as amended by this Ordinance, may be cited as the *Lands Ordinance* 1921-1939

Payments by Commissioners.

2.—(1.) Section four of the Principal Ordinance is amended by omitting paragraph (*b*) and inserting in its stead the following paragraphs :—

"(*b*) During the period of ten years commencing on the first day of July, One thousand nine hundred and thirty-seven, the Commissioners shall—

(i) pay to each land-owner from whom phosphate-bearing land is leased—

(*a*) a lump sum at the rate of £40 per acre of the land so leased, with a minimum sum of £5 where the area of the land so leased is less than 1 acre ; and

(*b*) a royalty of 4d. per ton of phosphate taken from the land according to certified weights

Provided that if, on the first day of July, One thousand nine hundred and forty-two, the price of phosphate f.o.b. Nauru exceeds 14s. per ton, the royalty payable in respect of succeeding periods of five years shall be increased by ½d. per ton for each 1s. per ton by which that price exceeds 14s. per ton, but the royalty shall not at any time exceed 6d. per ton ; and

(ii) pay to the Administrator, in respect of each ton of phosphate exported from Nauru, according to the certified weight of the quantity shipped—

(*a*) a royalty of 1½d. per ton to be used solely for the benefit of the Nauruan people ; and

(*b*) a royalty of 2½d. per ton to be held in trust for the land-owners from whose land the phosphate was taken and invested, as received half-yearly, at compound interest, for a period of twenty years from the date of such investment when the then capital shall be re-invested and interest thereon paid half-yearly to the land-owners or their legal personal representatives, in proportion to their respective interests in the original investment ;

(*ba*) During the period of twenty years commencing on the first day of July, One thousand nine hundred and forty-seven, the Commissioners shall—

(i) pay to each land-owner from whom phosphate-bearing land is leased—

(*a*) a lump sum at the rate of £45 per acre of the land so leased, with a minimum sum of £7 10s. where the area of the land so leased is less than 1 acre ; and

(*b*) a royalty of 5d. per ton of phosphate taken from that land according to certified weight :

Provided that if, on the first day of July, One thousand nine hundred and forty-seven, the price of phosphate f.o.b. Nauru exceeds 12s. per ton, the royalty payable in respect of succeeding periods of five years shall be increased by ½d. per ton for each 1s. by which that price exceeds 12s. per ton and shall, at the end of each period of five years from that date, be increased in respect of each succeeding period of five years by a ½d. per ton for every 1s. per ton by which the price of phosphate f.o.b. Nauru exceeds 12s. per ton, but the royalty shall not at any time exceed 6d. per ton ; and

(ii) pay to the Administrator, in respect of each ton of phosphate exported from Nauru, according to the certified weight of the quantity shipped—

(*a*) a royalty of 1½d. per ton to be used solely for the benefit of the Nauruan people ; and

(*b*) a royalty of 2½d. per ton to be held in trust for the land-owners from whose land the phosphate was taken and invested, as received half-yearly, at compound interest, for a period of twenty years from the date of such investment when the then capital shall be re-invested and interest thereon paid half-yearly to the land-owners or their legal personal representatives, in proportion to their respective interests in the original investment ".

(2.) This section shall be deemed to have commenced on the first day of July, One thousand nine hundred and thirty-seven and any royalty demanded or collected since that date in excess of that payable under the *Lands Ordinance* 1921-1927 shall be deemed to have been lawfully imposed and lawfully demanded or collected.

3. After section four of the Principal Ordinance the following section is inserted :—

Royalties

"4A. Royalties imposed by section four of this Ordinance shall be paid by the Commissioners in January and July of each year in respect of phosphate shipped from Nauru during the six months immediately preceding the month of January or July, as the case may be."

4. Section five of the Principal Ordinance is amended by omitting the word "twenty" and inserting in its stead the word "[illegible]rty".

Dated this thirtieth day of December, One thousand nine hundred and thirty-nine.

F. R. CHALMERS,
Administrator.

Annex 77

LETTER, AUSTRALIAN MINISTER FOR EXTERNAL AFFAIRS TO PRESIDENT OF NAURU, 4 FEBRUARY 1969

COPY FOR THE MINISTER'S OFFICE

File: 311/4/7 JCI/JMcL

Canberra

4 FEB 1969

Your Excellency,

New Airstrip for Nauru.

In your letter of 5th December, 1968 you proposed that a meeting be held between representatives of the Partner Governments and representatives of the Government of Nauru to discuss how best the airstrip on Nauru could be constructed as a rehabilitation project, and to determine the degree of financial and technical assistance and the Partner Governments would be able to offer.

I have consulted the New Zealand and British Governments on your proposal. You will recall that the Partner Governments, in the talks preceding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development. In the circumstances, therefore, you will understand that the Partner Governments are not able to agree to your proposal.

The Australian civil aviation authorities would, however, be ready to have talks confined solely to technical problems associated with the construction of a new or improved airstrip on Nauru and to give technical advice. If Your Excellency wishes I shall be happy to arrange with the Department of Civil Aviation for its representatives to hold discussions with representatives of the Government of Nauru at a mutually convenient time.

Yours sincerely,

(Paul Hasluck)

His Excellency Hammer DeRoburt,
O.B.E., M.P.,
President of the Republic of Nauru,
Office of the Nauru Government
Representative,
227 Collins Street,
Melbourne.

Annex 78

LETTER, PRESIDENT OF NAURU TO AUSTRALIAN PRIME MINISTER, 6 OCTOBER 1983

COPY

CONFIDENTIAL

REPUBLIC OF NAURU
NAURU ISLAND, CENTRAL PACIFIC

6th October, 1983.

In reply please quote

The Honourable Robert J. Hawke,
Prime Minister of Australia,
Office of the Prime Minister,
Parliament Building,
CANBERRA, A.C.T.

Dear Mr Prime Minister,

I thank you very much for sparing me some time from your very busy schedule on the Tuesday, 30th August, at the Lakeside Hotel in Canberra, to enable me to mention two outstanding matters which have been of serious concern to successive Governments of Nauru. As I had undertaken, I am now writing on one of these matters, the rehabilitation of worked-out phosphate lands on Nauru.

Prior to, and at the time of, Nauru's achievement of independence from the Partner Governments of Australia, New Zealand and the United Kingdom, we had requested Australia and the other Governments to rehabilitate that part of the phosphate deposit which had been mined by them for the benefit of their countries. However our requests were rejected by the three Governments, the last occasion being at the General Assembly of the United Nations in December 1967.

My Government, acting out of necessity and in pursuance of a formal resolution made during the First Parliament (1968 - 1971) of Nauru, has now decided to approach the present Government of Australia to seek a sympathetic reconsideration of Nauru's position in this matter.

We are presently in the process of preparing a detailed document for discussion with your Government but am attaching in advance thereof a brief summary of our views on the matter.

There are four basic facts that are of critical importance to us and which, we believe, should colour the thinking of each of the Governments of Australia, New Zealand and the United Kingdom. These facts are :

> without rehabilitation Nauru can never be our permanent home since around 67% of the land surface will be physically destroyed by the mining process

- rehabilitation would be costly and it will be beyond our capacity to finance
- we continue to expect the Governments of Australia, New Zealand and the United Kingdom to contribute to the cost of rehabilitation
- it is vital that work commence in the near future since rehabilitation must be spread over a number of years and as much as possible must be completed before phosphate mining ends so that there is an experienced work force on the island and adequate shipping for back-loading soil etc.

I cannot possibly over-emphasise the importance that my Government and the people of Nauru place on restoring the wholeness of our island for future generations of our people. We sincerely hope that the Government of Australia (and the Governments of New Zealand and the United Kingdom) will give very sympathetic consideration to our request when we again present it formally.

Yours sincerely,

(Hammer DeRoburt)
PRESIDENT

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